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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979
No. 79-118

ORLANDO DELLI PAOLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Preliminary Statement 3

Statement of the Case 4

Government's Case 4
Testimony on Behalf of Defendants 11

Reasons for Granting the Writ 19

POINT ONE—
The Court Committed Reversible Error by Permitting the Government to Demonstrate, Both Through Its Opening Statement as Well as the Subsequent Testimony of Detective Caracappa, that Co-Defendant Warme Had Made a Statement to Caracappa that Petitioner Delli Paoli Had Just Completed a $50,000 Drug Deal in Miami, Florida, a Highly Prejudicial Hearsay Statement Which Was Inadmissible Both Because it Constituted Impermissible "Other Crimes" Evidence and, Moreover, Since it Was a Co-Conspirator's Hearsay Declaration Which Failed to Meet the Relevant Pre-Conditions for Admissibility 19

(a) The hearsay declaration of the purported commission of the "other crime" was improperly admitted into evidence since it was not relevant to any issue in dispute at the trial and thus merely served the impermissible purpose of prejudicing Delli Paoli by permitting the jury to infer that he was a bad man inclined to deal in narcotics, a circumstance which was exacerbated by the fact that the court itself held the view that the declaration was untrue..... 20

(b) The admission into evidence pursuant to Rule 801(d)(2)(E) of the declaration regarding the $50,000 drug deal in Florida, was also violative of the rule prohibiting hearsay testimony. In that connection, the declaration failed to comply with the necessary pre-conditions of admissibility, since the statement was deemed unreliable by the court and, moreover, the other non-hearsay evidence adduced at trial failed to show that the declaration was either made during the course of the conspiracy or that the co-conspirator-declarant had personal knowledge of the subject of his statement. 30

POINT TWO—
Reversal Of the Judgment of Conviction is Required Because of the Misconduct on the Part of the Prosecutor in Intentionally Injecting Into the Trial the Spectre of Organized Crime Without any Legitimate Purpose..... 37

POINT THREE—
The District Court Committed Reversible Error by Refusing to Invoke Appropriate Sanctions such as the Striking of Direct Testimony of Various Government Witnesses Who Conceded that they Had

Intentionally Destroyed Various Reports of their Investigations which Material, in all Relevant Instances, Had a Significant Relationship to the Subject Matter of Direct Examination..... 41

POINT FOUR—
While the Indictment Charged One Narcotics Conspiracy, the Proof Established Multiple Narcotics' Conspiracies. This Variance Between Indictment and Proof Fatally Prejudiced Substantial Rights of Petitioner Delli Paoli..... 48

POINT FIVE—
The District Court Erroneously Failed to Sua Sponte Conduct an Evidentiary Hearing in Order to Determine Whether a Rift Which Had Developed Between Petitioner Delli Paoli and his Attorney Precluded Trial Counsel from Providing Effective Assistance to His Client..... 54

POINT SIX—
The Court Below Was in Error when it Declined to Grant Petitioner's Post-Verdict Discovery application, since the Items Sought had Been Received by the Court in Camera, During Defendant's Trial and the Information Contained in the Materials Was Relevant to a Legitimate Object of the Petitioner's Inquiry..... 60

Conclusion..... 68

Appendix A (Opinion and Judgment of Court of Appeals)..... 1a

Appendix B—Judgment and Probation Commitment Order...17a

Appendix C(Fed. R. Crim. P. 8(b))..... 18a

Appendix D (Rule 104(a) & (b)) 19a

Appendix E (Rule 403, Federal Rules of Evidence) 19a

Appendix F (U.S. Const., Fifth Amendment) 20a

Appendix G (U.S. Const., Sixth Amendment) 20a

Appendix H (Title 21 U.S.C. 812) 21a

Appendix I (Title 21 U.S.C. 841(a)(1) & (b)(1)(A)) 23a

CASES CITED

Berger v. U.S., 295 U.S. 78 (1935) 8

Chambers v. Mississippi, 401 U.S. 384 (1973) 65

Cross v. U.S., 392 F. 2d 360, 366-367 (8th Cir. 1968) ... 55

Davis v. Alaska, 415 U.S. 308 (1974) 65

Dennis v. United States, 384 U.S. 855, 874 (1966) 65

Goldberg v. U.S., 425 U.S. 94, 109-111 (1976) 47

In re Grand Jury Subpoena Directed Taylor to Appear and Testify, 567 U.S. 1183, 1188 (2d Cir. 1977) 62

Kotteakos v. U.S., 328 U.S. 750 (1946) 48

Lewis v. U.S., 340 F.2d 678, 682 (8th Cir. 1965) 47

Smith v. Illinois, 390 U.S. 129, 132 (1968) 65

U.S. v. Agueci, 310 F.2d 817 (2d Cir. 1962) 51

U.S. v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978) .. 21

U.S. v. Berger, 73 F.2d 278, 280 (2d Cir. 1934) rev'd on other grounds, 295 U.S. 78 (1935) 51

U.S. v. Bertolotti, 529 F.2d 149 (2d Cir. 1975) 48

U.S. v. Bufalino, 576 F.2d 446 (2d Cir. 1978) 41

U.S. v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970) 31

U.S. v. Jackson, 536 F.2d 628, 630 (5th Cir. 1976) 36

U.S. v. Leitner, 312 F.2d 107 (2d Cir. 1963) 24

U.S. v. Mallah, 503 F.2d 971 (2d Cir. 1974) 48

U.S. v. Moten, 582 F.2d 654, 660 (2d Cir. 1978) 62

U.S. v. Mase, 556 F.2d 671, 676 (2d Cir. 1977) 42

U.S. v. Miley, 513 F.2d 1191, 1206-1207 (2d Cir. 1975). 49

U.S. v. Miranda, 526 F.2d 1319, 1324 n. 4 (2d Cir. 1975) 48

U.S. v. Oates, 560 F.2d 45, 81 (2d Cir. 1977) 33

U.S. v. O'Connor, 580 F.2d 38, 42 (2nd Cir. 1978) 23

U.S. v. Puco, 476 F.2d 1099, 1107 n. 2 (2d Cir. 1973) cert. denied, 414 U.S. 844 (1973) 33

U.S. v. Robinson, 544 F.2d 611, 620-621 (2d Cir. 1976) cert. denied, 435 U.S. 905 (1978) 65

U.S. v. Rosner, 516 F.2d 269, 265 (2d Cir. 1975) cert. den. 427 U.S. 911 (1976) 52

U.S. v. Taylor, 563 F.2d 1345, 1365-1366 (2d Cir. 1977), cert. denied 432 U.S. 905 (1978) 65

U.S. v. Williams, 577 F.2d 188, 191 (2d Cir. 1978) 26

OTHER AUTHORITIES CITED

Fed. R. Crim P. 8(b) 3

Rule 104(a), 104(b) Federal Rules of Evidence 3

Rule 801(d)(2)(E), Fed. Rules of Evidence 30

Section 403, Federal Rules of Evidence 3

Moore's Federal Practice, Par. 33.03 (3) 62

Weinstein's Evidence, paragraph 104[05] page 104-43 (1977) 31

Weinstein's Evidence, paragraph 404[09] at 404-47 (1977) 23

Weinstein's Evidence, paragraph 801(d)(2)(E)[01] page 801-158 (1977) 35

STATUTES CITED

United States Constitution, Fifth Amendment 3

United States Constitution, Sixth Amendment 3

Title 21, U.S.C., Section 812, 841(a)(1); 841(b)(1)(A) ... 3

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No.

ORLANDO DELLI PAOLI

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Orlando Delli Paoli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 26, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 26, 1979, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the court commit reversible error by permitting the government to demonstrate that co-defendant Warme had made a hearsay statement that Delli Paoli had completed a $50,000 drug deal in Miami, Florida, in light of the fact that the statement both constituted impermissible "other crimes" evidence and, moreover, was a co-conspirator's hearsay declaration which failed to meet the relevant preconditions for admissibility?

2. Did the prosecutor commit prejudicial misconduct by intentionally injecting into the trial the spectre of organized crime, without any legitimate purpose?

3. Did the District Court commit reversible error by refusing to invoke appropriate sanctions in light of the fact that various government witnesses conceded they had deliberately destroyed reports of their investigation?

4. Was there a fatal variance between indictment and proof which prejudiced appellant in light of the fact that the indictment charged one narcotics' conspiracy and the proof established multiple narcotics' conspiracies?

5. Is a hearing required on the question of whether rift between a petitioner and trial counsel denied petitioner the effective assistance of counsel?

6. Did the Trial Court Improperly Deny Petitioner's Post-Verdict Motion for the Discovery of Materials Received by the Trial Court *In Camera*?

STATUTORY PROVISIONS INVOLVED

Fed. R. Crim. P. 8 (b)

Rule 104(a) & (b) Federal Rules of Evidence

Rule 403, Federal Rules of Evidence

U.S. Const., Fifth Amendment

U.S. Const., Sixth Amendment

Title 21 U.S.C., 812

Title 21 U.S.C. 841(a)(1) & (b)(1)(A)

PRELIMINARY STATEMENT

Petitioner, Orlando Delli Paoli, appealed from a judgment of the United States District Court, for the Southern District of New York, rendered October 12, 1978, convicting him, after a trial before Judge Gerard L. Goettel and a jury, of conspiracy to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code and sentencing him to a prison term of two years. Moreover, pursuant to Sec. 841 of Title 21, United States Code, he was placed on Special Parole for a term of ten years, to commence upon expiration of confinement.

On June 26, 1979, the Court of Appeals for the Second Circuit unanimously affirmed the judgment of conviction.

STATEMENT OF THE CASE

GOVERNMENT'S CASE

In the afternoon of January 24, 1978, Detective Stephen Caracappa was introduced to defendant Richard Warme by an individual named Lorraine who referred to Caracappa by the name he had assumed in his undercover capacity, to wit, Frankie (58a-59a*). Warme and Caracappa had some discussions about the sale by Warme to Caracappa of some cocaine and Warme indicated that he would supply Caracappa with a sample of cocaine the following day (59a-60a). On the following day, January 25, 1978, Warme delivered a small sample of cocaine and asked Caracappa whether he needed any mix, but Caracappa told Warme that he had enough mix and what he needed the most was heroin, in response to which Warme told Caracappa that he would bring him a sample of heroin the next day (61a-63a).

However, Caracappa was completely unsuccessful in obtaining any further narcotics from Warme for a period of at least one month, during which period of time Caracappa saw fit to speak with Warme on many occasions and to discuss the subject of narcotics with him on at least 8 separate occasions during that period, indicating to Warme throughout this period that he was very anxious to obtain narcotics (282a-288a). Moreover, early in the investigation, sometime in February of 1978, Warme informed Caracappa that he was not familiar with the business of narcotics and that he did not know the first thing about heroin or cocaine (301a-303a).

On February 16, 1978, Caracappa agreed to act as a middle man in order to dispose of some valuable vases belonging to Warme, having led Warme to believe that he could be of some assistance and, in connection with that representation, Carcappa accepted the vases on a contingent basis to see what kind of a

*References are to pages of Co-Appellants' Joint Appendix, unless otherwise indicated. Since Warme and Delli Paoli are represented by the same attorneys on this application, the factual resume is identical for each. It has been set forth in full in each petition for the convenience of the reader.

price he could obtain for them (313a-314a). And, when Warme indicated to Caracappa that he was in need of money, the detective lent Warme the sum of $800 in connection with the acceptance of the consignment of vases (315a-316a).

Subsequently, on February 21, 1978 Caracappa and Richard Warme met on 57th Street and 6th Avenue in New York City and had a conversation in a bar in that vicinity, during the course of which Warme informed Caracappa that he was having difficulty obtaining samples of heroin and cocaine and they arranged to meet at Warme's residence that evening in order to resume discussions about that subject (64a). Later that evening, Caracappa and Warme met at Warme's apartment and went from that location to a bar in the Bronx where an individual named Vincent Rungo, an unindicted co-conspirator in this case, informed Caracappa that another individual who was speaking with Warme at the time was "Bobby, the connection" (65a-66a).

The individual called Bobby, whose identity was later learned by Caracappa to be defendant Robert Bolella, indicated that he expected some heroin to become available and that Caracappa would be given first opportunity to purchase it when it actually arrived (66a-68a). Caracappa also accepted an offer by Bolella to purchase some cocaine at the price of $1200 per ounce, but when Caracappa met with Bolella at Warme's apartment the following day, he was informed by Bolella that the cocaine they had received was bad and it would take a few more days before they received any further material (68a-70a).

On February 25, 1978 Caracappa met with Warme, Rungo and Bolella at Warme's residence, from which location Caracappa and Bolella went to a parking lot in Scarsdale where Bolella and Caracappa discussed the sale of some cocaine and Bolella handed Caracappa a sample (71a-73a). At that point Caracappa and Bolella entered into an agreement for the pur-

chase of $1200 worth of cocaine and Bolella left temporarily and shortly thereafter returned with a white plastic bag containing cocaine which was given to Caracappa (72a-74a). When Bolella and Caracappa thereafter returned to Warme's apartment, Caracappa gave Bolella the balance of the monies due for the cocaine out of which a $100 bill was given to Warme (74a-75a).

On March 2, 1978, at about 3:00 in the afternoon, defendant Wayne Petrucha and Warme met with Caracappa at a furniture store in the Bronx owned by Richard Warme's mother-in-law (84a-85a, 89a-90a), where a sample of cocaine was given to Caracappa by Petrucha and a price of $1400 per ounce was arrived at for the sale of cocaine (86a). Caracappa, Warme, and Petrucha met later that evening at the same location, at which time Petrucha gave Caracappa a plastic bag containing 5 ounces of cocaine, in connection with which a total price of $7,000 was agreed upon, and $5,000 of that purchase price was paid to Petrucha by Caracappa (94a).

On March 9, 1978 Caracappa, accompanied by his partner, Detective Petraglia, met in the late afternoon with Richard Warme, Vincent Rungo, as well as Wayne Petrucha and co-defendant Victor Isaza (108a-109a). Petraglia, Caracappa and Warme went to the Cross Town Diner and had a conversation, during the course of which Warme told the detective that he had been in touch with some people who were going to supply some heroin and that there was plenty of heroin available, but that these people would not deal directly with Caracappa or Petraglia so that it was necessary for a marriage to be made between Richard Warme and the person who was going to supply the heroin and that Warme would himself deal the heroin at that point to Caracappa (111a). Warme indicated that the individual who would make this marriage was "an old man and that he was a made man" and the parties discussed various prices for heroin, agreeing upon a price of $11,000 for the purchase of 7 ounces of white heroin (111a-112a).

Later on March 9, 1978 Caracappa and Warme went to his residence where Wayne Petrucha came up to his apartment with another individual, defendant Victor Isaza. At that point in time Isaza and Petrucha sold 5 ounces of cocaine to Caracappa for the price of $6,000 (114a-115a). After Petrucha and Isaza had departed, Warme was given $400 by Caracappa purportedly representing his cut on the deal (116a-117a).

On March 14, 1978 Caracappa and Petraglia met with Warme in the Cross Town Diner where Warme indicated that the "marriage" had been made between Warme and the heroin connection and that the parties should be expecting some heroin within a few days (122a-123a). Warme also indicated "that the old man was hooked up with fat Tony Salerno and the old Pleasant Avenue people" (124a). At the Cross Town Diner, Warme engaged in negotiations with Petraglia and Caracappa for the purchase of 7 ounces of heroin for $11,000 (136a). Two days later, on March 16, 1978, Caracappa and Petraglia met with Warme at the Jomar Furniture Store in the Bronx where Warme informed the two detectives that the deal should be completed later that evening and that one of the "bosses was overseeing the heroin deal and that he was very, very careful because he had just completed a $50,000 heroin deal in Miami, Florida" (137a-144a).

Thereafter, at a time when Caracappa, Petraglia, Vincent Rungo as well as co-defendant Richard Warme and his wife, Diane Warme, were in the Jomar Furniture Store, petitioner Orlando Delli Paoli was observed to enter the store and, with the assistance of Vincent Rungo, place some chairs in his car (151a-153a).

On March 19, 1978, Warme met with Caracappa and Petraglia at the Jomar Furniture Store where Warme informed the detectives that the deal would be completed that evening, and when Robert Bolella eventually arrived at about 1:30 in the

afternoon, the detectives gave Warme $11,000, and Warme left the premises (154a-155a). However, Warme returned an hour later to indicate that the heroin had not yet arrived. Petraglia, Caracappa and Bolella went to another location in the Bronx where Bolella eventually received a phone call which he indicated was from Richard Warme and he informed Caracappa that the detectives would get the package they were expecting the following evening (157a-158a). While the detectives were in the Bronx with Bolella they saw fit to employ hostile gestures, including the brandishing of Caracappa's weapon, in order to convey to Bolella they would employ whatever steps they deemed necessary in order to secure the return of the $11,000 or the heroin they had been promised (460a.1-460a.9).

On March 20, 1978 Warme informed Caracappa that there had been a delay in the delivery of the package and returned $9,000 to Caracappa, indicating that he was required to leave $2,000 with the people involved as a binder, and also informed Caracappa that the heroin was no longer going to be white heroin, but that on this deal it would be brown heroin (163a-164a).

On March 23, 1978 Caracappa met with Richard Warme and Warme apologized for the $2,000 which was still outstanding, but told Caracappa that he should not worry because the heroin was definitely going to come in over the weekend, that it was pure heroin, and at that point Warme and Caracappa negotiated for the purchase of one pound of pure heroin for the price of $7,000 (182a-183a). However, in light of Caracappa's belief that he could not put together that kind of money, the parties also discussed other means by which to make a smaller purchase (183a). After negotiating this deal for heroin, Warme told Caracappa that "he would speak to his man" (183a). Warme departed and was observed by a surveillance agent to go from the location where he had met with Caracappa over to the Andrea Motel at which latter location he was seen in the company of petitioner Orlando Delli Paoli (422a-424a).

On March 27, 1978, Warme informed Caracappa that "the chairs were in" and met with Caracappa at the furniture store in the Bronx where he was told by Caracappa that before any more money would be given to Warme that Warme would be required to inform Caracappa who the parties were doing business with (184a-186a). Warme said that the person they were doing business with was "Bobby London and that he owned the Andrea Motel on the New England Thruway" (187a). At about 3:00 in the afternoon Petraglia arrived and indicated to Caracappa and Warme that he had $20,000 with him, at which point Warme was given the $20,000 and went over to the Andrea Motel while Caracappa and Petraglia waited at another nearby motel, called the Town & Country (188a-190a).

About an hour later Warme returned to indicate to the detectives that everything was going fine and that they should be receiving the package later on (189a-190a), but a short time thereafter another party got on the phone and indicated to Caracappa that he was Bobby, Richie's friend, and that Caracappa and Petraglia should take a room in the Town & Country Motel and wait at that location (190a-191a). Thereafter, at about 10:30 p.m. Caracappa was informed by Diane Warme that there would be a further delay and indicated that a man across the street wanted to talk to them, so the detectives went across the thruway to the Andrea Motel where they met with petitioner Delli Paoli who introduced himself to Caracappa as Bobby, Richie's friend, and said that they should not get excited, but that there was a problem (192a-193a). Delli Paoli told Caracappa that a good friend of his, a man that he had known for 25 years by the name of Sam Shafano had received the money and was supposed to have returned within 45 minutes to deliver the heroin, but that he had not returned and that Richie was at that time out looking for Shafano (193a-195a).

Delli Paoli further stated to Caracappa that one of three things may have happened, that Shafano may have been locked up, that he may not have been able to obtain the heroin, or "we took a beat" (195a), which latter phrase, in narcotics parlance, indicates that he took off with the money. Shortly after this meeting concluded at about 1:00 a.m., early the next morning, the parties left the Andrea Motel and Caracappa met with Delli Paoli at Warme's residence. Diane Warme went to make some coffee and Delli Paoli indicated to Caracappa that it looks like "they took a beat," because no one has seen Sam Shafano, although alot of people have been looking for him (196a-197a). Delli Paoli agreed to pay the interest which was allegedly owed to the loansharks for making the loan of the said $20,000 (197a).

On March 28, 1978 Caracappa and Petraglia met with Warme at his residence and were told by him that they had been looking for Shafano all night but that he had apparently disappered (199a). Delli Paoli arrived at Warme's apartment and indicated that people were looking for Shafano and that they had even been looking for him in Florida and the detectives were given a telephone number at which they unsuccessfully tried to reach Shafano (200a).

Caracappa indicated that whether Shafano was located or not, that someone had to make up the $20,000 which was missing (200a), in connection with which the parties discussed the acquisition of some cocaine in order to make up for the missing $20,000, and Delli Paoli offered to obtain some brown heroin in order to make a deal for the coming Friday (201a-202a). Later that evening, Petraglia and Caracappa were informed by Warme that Wayne Petrucha had brought 3 ounces of cocaine to his store, but that it had been rejected and that tomorrow night he would have the full 8 ounces required to make restitution for the missing money (206a). Later that evening, Caracappa informed Warme that he was having trouble with his people in Brooklyn and that Caracappa's family were being threatened so that he inquired of Warme whether instead of obtaining 8 ounces of heroin he could get him 1 pound of cocaine which would make up for the $20,000, even if it was bad quality (207a).

On March 29, 1978 Warme, Robert Bolella, Petraglia and Caracappa met in the area of CoOp City in the Bronx where Warme gave Caracappa a plastic bag containing cocaine (217a-223a), which Warme had ripped off from Wayne Petrucha (316a, 379a, 384a, 391a-394a).

On March 20, 1978 Caracappa and Petraglia met with defendant Richard Warme in the Andrea Motel in the Bronx (262a-265a). After some discussion of the aborted $20,000 heroin deal, during the course of which Warme informed the two detectives of the way in which Warme, Delli Paoli and Shafano had intended to divide the profits of that transaction, Warme gave Caracappa 4 tin foil packets containing cocaine (265a-267a). Of the 4 packages of cocaine, 2 were given to Caracappa by Warme and in the very late evening hours of March 30, 1978 the other two were delivered by Warme to Caracappa after midnight so that the actual delivery of the latter two packages was March 31, 1978 (268a).

TESTIMONY ON BEHALF OF DEFENDANTS

DIANE WARME, a co-defendant, testified that she was acquainted with the co-defendants Robert Bolella and Wayne Petrucha, having met both of those individuals through her husband, Richard Warme (554a-555a). She also was acquainted with petitioner Delli Paoli, having known him for several years and in fact having previously resided in a house owned by Mr. Delli Paoli in the Bronx (556a).

Diane Warme first met Detective Caracappa some time in February of 1978 in her apartment when Caracappa met with Richard Warme and engaged in a conversation regarding some vases (559a-562a). Caracappa, who was known to Diane Warme in his undercover identity of Frankie Black, told Richard Warme that he had brought the vases to his people and that he thinks that he could get about $20,000 for them (562a).

Diane Warme spoke with Caracappa on the telephone about 25 times and also saw him come to her apartment about 25 times (560a). Caracappa's partner, Detective Petraglia, was seen by Diane Warme to come to her apartment about 15 times (561a). On one occasion early in March, Caracappa expressed a concern for the health of one of Diane Warme's children and offered to purchase a bicycle for him in order to exercise (565a-567a), and on the very same occasion gave both of Diane Warme's sons a few dollars with which to buy candy (567a).

Mrs. Warme recalled an incident which took place on March 19, 1978 when at about 11:30 in the evening Robert Bolella, in the company of Caracappa and Petraglia, came to her apartment looking for Richard Warme (580a). Caracappa took Diane Warme to the side of one of the rooms in the apartment and told her that Bolella "had him crazy," and that Richard Warme had been given some money by Caracappa and Petraglia but that he didn't return and that they were looking for him (580a-581a). At that point Bolella told Diane Warme that his life was on the line because "These guys had guns to my head" (581a). Bolella then further pleaded with Diane Warme to tell them of Richard Warme's whereabouts, when Caracappa said "I don't want to know nothing. I want my f'ing money.*** You want to act like a wise guy and you are going to have to take the consequences like a wise guy because I am out any money I will blow your f'ing head right off your shoulders." (518a). In light of all the commotion that was taking place at the time and because of the late hour, she told Caracappa and

Petraglia that whatever they wanted was between her husband and them and to leave her house immediately (582a). Petraglia then told Bolella that they were out a great deal of money which they wanted and Diane Warme began to holler at Bolella, Frankie and Pete with the result that her son, Scott Warme, woke up and inquired if anything was wrong but was told by his mother to go back to bed (582a-583a).*

On March 27, 1978 Diane Warme received a telephone call from her husband who asked her to go over to a restaurant and pick up Caracappa and Petraglia and bring them over to the Andrea Motel, this phone call having taken place about 5:30 or 6:00 in the evening (590a-591a). She picked up Caracappa and Petraglia and they went in two cars over to the Andrea Motel where Orlando Delli Paoli was standing in the office (593a). Diane Warme told Delli Paoli that Richard Warme had instructed her to bring Caracappa and Petraglia over to the Andrea Motel and at that point in time she introduced Delli Paoli to Caracappa and Petraglia and the three men went up to a room in the hotel while Diane Warme waited in the office (593a-594a).

About 5 minutes later Delli Paoli, Caracappa and Petraglia came out of the room they had been in, returned to the office and Diane Warme and Delli Paoli left the Andrea Motel and went to her house, arriving there at about 7:30 in the evening (595a). When Delli Paoli and Diane Warme arrived at her residence they noticed that Caracappa and Petralia were waiting in front of the house in their car (595a).

When all 4 parties arrived in Diane Warme's apartment she overheard them tell Delli Paoli that they had given Richard Warme some money and that he had not returned with it and that they wanted their oney and both of them seemed extremely angry (596a). At the same time two of her children, namely Richard and Vincent, were watching television and her small

*This testimony was confirmed by the testimony of Scott Warme, the Warme's twelve year old son, who asserted that Petraglia, Caracappa, Bolella and Diane Warme were engaged in such an argument (644a-648a).

children were sleeping (596a). Petraglia said to Delli Paoli "He ran away with my f'ing $20,000" and Delli Paoli replied "Richie didn't run away with your money, Richie told me that he didn't take your money." (597a).

Delli Paoli said he sis not know where Richard Warme was and at that point Petraglia said to Diane Warme "Listen, you know what has to be done here, you know what I got to do. I am taking one of your kids as collateral until I get my f'ing $20,000. For every day I wait, I will take a finger from your kid and if I wait 5 days, I will take the whole fucking arm" (597a). In reply, Diane Warme told them to leave the apartment, jumped off the table she had been sitting on and obtained a knife and attempted to stab Petraglia in the chest, but Caracappa grabbed her and she told them she couldn't care if they were out $120,000, that they were nothing byt lowlife scum and to get out of her house (597a). With that, Caracappa removed a pistol from an ankle holster in his leg and said he was going to kill Diane Warme and her husband if he didn't get the $20,000 and he was going to take her baby's fingers and hands (598a).

When Diane Warme continued screaming and all of the parties got embroiled in an argument she asked them again to leave the house, which they eventually did (599a). Later that following day, Diane Warme related these events to her husband, Richard Warme (600a).

On March 28, 1978 at about 11:30 Richard Warme met with Delli Paoli, Caracappa and Petraglia at the Warme's apartment (600a-601a). Diane Warme went to an adjoining room where she overheard a portion of a conversation during which Richard Warme and Caracappa said to Delli Paoli that it was alright and that they had the problem all straightened out to which Delli Paoli replied that he was glad to hear it (602a).

On March 29, 1978 at about 8:00 in the evening, Diane Warme arrived at her mother's furniture store where she saw her husband and Detective Caracappa (604a). She inquired of her husband what they were doing in the store at that hour and what he was doing with Caracappa, when Wayne Petrucha arrived at the store (605a). After Richard Warme met briefly with Petrucha and Caracappa, Warme went to the back of the store and Wayne Petrucha remained with Diane Warme where they engaged in a conversation during the course of which he asked Diane Warme to go back and see how long "it's taking them" (606a). Diane Warme went to see what the other parties were doing, but she saw that they had left the premises, a fact which she reported to Petrucha (607a). Petrucha ran out into the yard and came back in screaming "Oh my God, oh my God, oh God. I just got beat for $10,000 worth of Coke." With that, Petrucha ran out of the store and returned with 3 other men, all of whom had pistols out and they commenced to run all around the store, as well as in the backyard and asked Diane Warme where her husband was (608a). The other men were blaming Petrucha for the loss of the cocaine, telling him that he wasn't "supposed to let it out of his hands unless they showed you the money first" (609a). They then instructed Petrucha to stay in touch with Diane Warme and not to leave until he was able to reach her husband and they told him that they did not want their cocaine back, they just wanted their money (610a).

When Richard Warme called Diane Warme later in the day she asked him why he had robbed Petrucha (611a) and in a later conversation on March 30, 1978 Richard Warme told his wife that Caracappa had a gun and instructed him that he better get the packages whatever way he could and he had no choice (617a). Also on the 30th, in a face to face meeting, Richard Warme told Diane Warme that if he did not get the package from Wayne that he would have a lot of problems and that he had to take the package from Petrucha in order to satisfy Caracappa and Petraglia because Caracappa's daughter had been kidnapped (626a-627a).

ROBERT ORLANDO DELLI PAOLI, called as a witness in his own behalf, indicated that he was acquainted with the family of Richard Warme, including his wife, Diane Warme, as well as his children, having known the family for about two years inasmuch as the Warme family had resided in a house which Delli Paoli had owned in the Bronx (649a-651a). Delli Paoli also indicated that he was familiar with Diane Warme's mother, having purchased some chairs from her in her furniture store in the Bronx (653a-654a), and Delli Paoli indicated that on the day he was seen by Detective Caracappa in the furniture store in the Bronx that he had gone to the store that day to pick up some chairs which he had purchased (653a). Referring to various photographs which had been introduced into evidence by the government, Delli Paoli testified that on many occasions he had met with Richard Warme in various locations and talked to him about various subjects, including the construction business in which Mr. Warme was engaged at the time (654a-655a).

On the 27th of March, 1978, Richard Warme had a conversation with Delli Paoli during the course of which Warme indicated to Delli Paoli that he was in serious trouble (with money) and requested that Delli Paoli speak to the two individuals with whom he had become embroiled in this trouble to see whether he could help Warme (655a-658a).

Delli Paoli agreed that he would try to help resolve the problems over money that Richard Warme was having with these individuals, as a result of which later in the day Diane Warme brought two men over to meet with Delli Paoli, which two men later turned out to be the undercover detectives involved in the matter, namely Detectives Caracappa and Petraglia (658a-661a). Delli Paoli went into a room at the Andrea Motel where he met with Petraglia and Caracappa without anybody else being present at the time (665a). Caracappa said to Delli Paoli "that there is an awful lot of money involved in here, and

if you say you are interested in Richie you f'ing old man, old bastard, something has got to be done" (666a). Delli Paoli told Caracappa not to get excited, but when someone made a rattling noise at the door, Caracappa and Petraglia both jumped up and pulled their guns out and inquired who was at the door (666a-667a). When Caracappa and Petraglia realized that the noise was only being caused by a maid who was cleaning the room, they asked where Richard Warme was, but Delli Paoli refused to tell them of Warme's whereabouts, even though he knew that Warme was hiding in another room of the motel (668a). Caracappa indicated to Delli Paoli that he could help Warme because he owned a motel and had money, but Delli Paoli said he didn't know what he could do until he found out what the whole problem related to (668a-669a). Delli Paoli thereafter went to Diane Warme's house, arriving there about 7:30 in the evening, where he met Diane Warme, Caracappa and Petraglia, and the officers inquired of Delli Paoli where Richie was, indicating that they did not believe that Delli Paoli was not aware of his whereabouts at the time; however, Delli Paoli feared for Warme's safety so he refused to tell them where Warme was (671a-673a). The detectives indicated that one of the children of the two undercover detectives had been kidnapped at which point Delli Paoli said "My God, this sounds like a very serious deal here, kidnapping kids" (674a). Delli Paoli testified that he was reluctant to relate the remainder of this incident, indicating that the testimony Diane Warme had given with respect to the threats made regarding her children was exactly what occurred at that time (674a-675a).

Delli Paoli denied that he ever told Caracappa and Petraglia that it looked like there had been a beat or that a man named Sam Shafano whom he had known for 25 years had taken the money and not made a delivery of heroin (676a). Delli Paoli also testified that he did not know anyone by the name of Sam Shafano (676a-677a). Directing his attention to an address book which was seized at the time of his arrest, petitioner's

lawyer asked him some questions with reference to a telephone number, namely, 914-423-4143, appearing in the book and indicated that the number belonged to "Debbie Sani, a hooker" who was known to Delli Paoli (680a-682a). However, after objection by other counsel, Mr. Delli Paoli's attorney withdrew the offer of the telephone book and the prosecutor indicated that he intended to offer it upon his case (686a).

On March 28, 1978 Richard Warme called Delli Paoli at his motel and Delli Paoli informed him that he was scheduled to meet with Caracappa and Petraglia, but Warme indicated that he did not wish to meet with them (691a-692a). At about 12:30 Delli Paoli met with Caracappa and Petraglia, in the company of Diane Warme at her residence (692a). Caracappa again indicated that a lot of money was involved and then told Delli Paoli that "we got this all solved. It's half solved." (693a).

Caracappa began to use profanity and indicated that Delli Paoli would have to help them solve their problem, at which point Delli Paoli inquired to Caracappa what the problem had to do with him (694a). When Delli Paoli further emphasized that he was not aware of what the problem had to do with him, Caracappa said to him "Did you know about this coke thing, about coke?" (695a). When Caracappa mentioned the word coke Delli Paoli "jumped up from the table" and said "I don't want to talk about this for a million dollars, this kind of a subject. I want to get out of here. I'm a legitimate businessman. I want to get out of here." (695a).

When Caracappa persisted that Delli Paoli would have to see what he could do to get some money, Delli Paoli indicated that if Caracappa went to a shylock that in that event Delli Paoli would pay the interest which was all that he was willing to do at that point (676a). When Caracappa insisted he couldn't get the kind of money involved, Delli Paoli got up and walked out of the apartment (696a-697a). From that point on, he never met

with any of the men again (697a), although he did have a telephone conversation with Caracappa (697a-698a). Delli Paoli denied that he had agreed to be a source of supply of a large quantity of heroin (707a).

Delli Paoli also testified that in light of the incident which took place on March 27, 1978, during which threats had been made on Diane Warme's life, that petitioner was fearful of her safety (702a).

REASONS FOR GRANTING WRIT

In affirming the judgment of conviction, the Court of Appeals decided numerous federal questions in ways in conflict with applicable decisions of this Court, and contrary to decisions in other circuits. Additionally, the Court of Appeals has so far sanctioned departures by the District Court from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

POINT ONE

THE COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE GOVERNMENT TO DEMONSTRATE, BOTH THROUGH ITS OPENING STATEMENT AS WELL AS THE SUBSEQUENT TESTIMONY OF DETECTIVE CAACAPPA, THAT CO-DEFENDANT WARME HAD MADE A STATEMENT TO CARACAPPA THAT PETITIONER DELLI PAOLI HAD JUST COMPLETED A $50,000 DRUG DEAL IN MIAMI, FLORIDA, A HIGHLY PREJUDICIAL HEARSAY STATEMENT WHICH WAS INADMISSIBLE BOTH BECAUSE IT CONSTITUTED IMPERMISSIBLE "OTHER CRIMES" EVIDENCE AND, MOREOVER, SINCE IT WAS A CO-CONSPIRATOR'S HEARSAY DECLARATION

WHICH FAILED TO MEET THE RELEVANT PRE-CONDITIONS FOR ADMISSIBILITY.

(a) The hearsay declaration of the purported commission of the "other crime" was improperly admitted into evidence since it was not relevant to any issue in dispute at the trial and thus merely served the impermissible purpose of prejudicing Delli Paoli by permitting the jury to infer that he was a bad man inclined to deal in narcotics, a circumstance which was exacerbated by the fact that the court itself held the view that the declaration was untrue.

The government was permitted by the Court to commence the development of a highly prejudicial line of proof that petitioner Delli Paoli had engaged in a heroin transaction completely unrelated to the crimes charged in the indictment at the very inception of the trial when the prosecutor, in his opening statement, alerted the jury that he intended to prove during the trial that co-defendant Richard Warme had informed Detective Caracappa, the primary witness for the government in the prosecution herein, that petitioner Delli Paoli had recently completed a $50,000 drug deal in Miami, Florida. In the prosecutor's relevant remarks on that subject during the course of his opening statement, it was made crystal clear to the members of the jury that the government intended to prove that the individual who had allegedly completed this major drug transaction in Miami, Florida was in fact petitioner Delli Paoli (51a-55a). In so doing, the prosecutor was able to portray Delli Paoli at a juncture in the trial when none of the relevant evidence had yet been adduced, as an individual who had allegedly committed a serious narcotics' crime which was totally unrelated to the prosecution which was about to commence, and thus fatally infected the minds of the jurors in connection with their evaluation of the evidence which was about to unfold during the course of the trial itself.

It is significant to note at the very outset that the court below failed to heed the recent admonition of the court "that admission of such strongly prejudicial evidence should normally await the conclusion of the defendant's case, since the court will then be in the best position to balance the probative worth of, and the government's need for, such testimony against the prejudice to the defendant [*United States v. Benedetto,* 571 F.2d 1246, 1249 (2d Cir. 1978).

Shortly after the government's opening statement, during the testimony given by the government's very first witness, Detective Caracappa, it was elicited by the prosecutor that the individual who was "overseeing the heroin deal was very, very, very careful and that he didn't want to meet anybody because he had just completed a $50,000 . . . ." (137a-138a), at which point in the testimony objection was raised by trial counsel for Delli Paoli who obviously was aware of what the prosecutor was driving at in light of the clear fact developed during his opening statement that he intended to bring out during the course of the trial that Delli Paoli had completed a $50,000 drug deal in Miami, Florida. This projected line of testimony was made even more damaging by certain other allusions which took place immediately preceding its development by the prosecutor, during the course of which Caracappa testified that Richard Warme had indicated to him that "the old man was hooked up with fat Tony Salerno and the old Pleasant Avenue people" (124a) a line of testimony which itself was objected to by counsel for Delli Paoli and Warme on the grounds that its only purpose was to indicate an alleged link between Delli Paoli and organized crime.

In connection with the objection by counsel to the developing line of testimony concerning the alleged $50,000 drug deal engaged in by Delli Paoli in Miami, Florida, the court heard argument on the question of the relevance of the so-called "other crimes" testimony on the issues which were framed in

the trial itself, at the conclusion of which the court determined that it would permit this line of testimony as to the alleged other crime committed by Delli Paoli, in order to demonstrate that the defendants were capable of delivering heroin to Detective Caracappa and the other undercover agent. This theory of purported relevance was predicated upon the prosecutor's assertion that there would be no proof during the course of the trial that any heroin ever was transferred from any of the defendants to the government's undercover agents (138a-149a). Of course, as already pointed out, in permitting the introduction of this other crime evidence at that very early stage of the trial, the court further exacerbated its failure to heed the admonition in *United States v. Benedetto, supra,* about the prejudicial impact of permitting such evidence, even assuming its relevance, at a juncture in the trial when it was virtually impossible to determine the probative worth of, or the government's necessity for, such testimony as balanced against the clear prejudice to the defendant.

The failure on the part of the trial court to defer a consideration of the propriety of admitting such other crimes evidence until the proper stage of the trial, is only the first of numerous hurdles standing in the way of a demonstration by the government that the court below did not commit reversible error in admitting this highly prejudicial testimony relating to the drug deal in Florida. Indeed, there are at least 3 other major reasons for this court to declare that the admission of this prejudicial testimony of other crimes was reversible error. In analyzing the reasons spelling out inadmissibility, it is important to focus upon the theory upon which the District Court judge based his decision to admit the other crimes evidence, since Second Circuit has recently indicated the inappropriateness of retroactively sanctioning lower court rulings on an issue involving so-called "other crimes" evidence on theories not utilized at the time the evidence is adduced by the government, especially since the protective limiting instructions the court saw fit to

render in this prosecution would be meaningless if the admission of the evidence relating to the heroin deal in Miami, Florida could be upheld by the Court of Appeals on grounds other than those adopted by the trial judge [*United States v. O'Connor,* 580 F.2d 38, 42 (2nd Cir. 1978)].

Before turning to the question of whether the so-called other crimes evidence was relevant to any issue in dispute at the trial, we note that this inquiry into relevance may not even be necessary in this case inasmuch as there is a substantial independent ground for the exclusion of the other crimes evidence since the testimony embodying the alleged drug deal engaged in by Delli Paoli in Miami, Florida was based exclusively upon a hearsay declaration made by co-defendant Warme to Detective Caracappa, and is totally unsupported by any evidence whatsoever tending to indicate that such other crime was ever committed by Delli Paoli, who emphatically denied during the course of the trial that he had ever engaged in such a course of criminal conduct (712a). As pointed out by a highly regarded commentator in the field of evidence, "Doubt about whether the other crime took place and the serious time and prejudice problems which can arise when such a subsidiary issue is contested often provides strong independent grounds for the exclusion of such other crime evidence" [Weinstein's Evidence, paragraph 404[09] at 404-47 (1977)].

In the case at bar, the District Court judge did not even trouble himself to instruct the jury that there was serious doubt as to whether such a crime had ever been committed as underscored by the fact that the court itself held the view that Warme's statements were "puffery" (Sentencing remarks, 816a.2-816a.3). Nevertheless, the court merely alluded in passing that the jury should consider whether the other crimes evidence was truthful (145a). As a result, in light of the court's own view that the "puffery" showed an absence of truth, and in light of the later denial by Delli Paoli that he had ever engaged in such a drug deal, the admission of the highly prejudicial

evidence, in the face of a total lack of proof that it had ever taken place, in and of itself constitutes reversible error warranting a reversal of Delli Paoli's conviction [see *United States v. Leitner,* 312 F.2d 107 (2d Cir. 1963) (Court saw fit to give strong charges involving the fact that serious doubt existed about the so-called other crime)].

Even if there had been proof positive in the case that Delli Paoli had engaged in a $50,000 drug deal in Miami, Florida, the evidence of this so-called other crime would nonetheless have been inadmissible in light of the fact that it utterly failed to meet the prerequisites for admissibility set forth in Sections 404(b) and 403 of the Federal Rules of Evidence. To begin with, in order to pass muster under the first branch of admissibility test which is set forth in Section 404(b) it was necessary that the evidence be substantially relevant to some issue in the trial itself [*United States v. Benedetto, supra,* at 1248]. Absent such a showing of significant relevance to an issue in dispute at the trial, the statement made by Warme about Delli Paoli could only have served the highly impermissible purpose of showing that Delli Paoli was a bad man inclined to engage in heroin transactions so that the jury could impermissibly infer that he also would thus have been likely to have engaged in the conspiracy charged in the indictment in Count One thereof to improperly distribute heroin in violation of the relevant sections of the United States Code.

An evaluation, however, of the theory upon which both the prosecutor and the District Court judge sought to justify the admissibility of the evidence contained in the statement by Warme that Delli Paoli had allegedly involved himself in a $50,000 heroin transaction in Miami, Florida is not even remotely relevant to any issue which had been framed at the trial itself. The only count of the indictment which involved a consideration by the jury of whether the defendant Orlando Delli Paoli was in some fashion involved in heroin traffic was Count One of the

indictment involving the charge of conspiracy. Inasmuch as the basis for the District Court judge's ruling of the admissibility of the other crimes evidence was that it was relevant to the question of whether the defendants were capable of consummating the delivery of heroin to the undercover agents, the apt inquiry is whether petitioner Delli Paoli's capability of actually consummating the heroin transaction which his co-defendant Warme was discussing with the undercover agents, was a relevant issue at the trial of the indictment.

As to that, it is the position of appellant Delli Paoli that not only is that not a substantially relevant issue at the trial herein, as required by *United States v. Benedetto,* but that the question of petitioner's ability to actually consummate the heroin transaction being discussed by Warme and the undercover agents was no issue at all at the trial. Careful analysis of the rationale underlying the District Court judge's admission of the other crimes evidence spells out rather clearly that the court deemed the evidence relevant to show an ability to deliver heroin because the prosecutor had indicated that there would be no proof forthcoming during the trial that any heroin transaction ever was actually consummated between the undercover agents and the respective co-defendants.

Even if we were to proceed for the sake of argument upon an assumption that the question of whether the co-defendants actually possessed the capability of consummating the heroin transaction with Detectives Caracappa and Petraglia may have loomed in the judge's mind as a potentially relevant issue at the time at which the prosecutor first called the jurors' attention to the other crimes evidence at the very inception of trial, later developments made it abundantly clear that any such issue could not really have been in dispute at the trial. The judge's inability to properly evaluate the relevance of the other crimes evidence underscores the *ratio decidendi* of the admonition in *Benedetto* that the type of strongly prejudicial evidence

presented by allusions to other crimes by a defendant is best held back by the government for introduction after the conclusion of the defendant's case, at which time the court is best able to balance the probative worth of the evidence against the clear potential for prejudice to the defendant which it presents.

In a more recent case which also serves to highlight the necessity for waiting until the end of the defendant's case before introducing so-called other crimes evidence, the court had occasion to elaborate upon the purpose of the rule in terms of pointing up the difficulty of determining whether the issue upon the prosecution offers the other crimes evidence is actually in dispute, until it becomes clear whether the defendant is going to take the stand and, if he actually opts to testify, what his defense is going to be [*United States v. Williams,* 577 F.2d 188, 191 (2d Cir. 1978)].

In the trial in this case, Detectives Caracappa and Petraglia gave testimony which, if accepted by the jury, would place Delli Paoli right in the midst of a heroin transaction being negotiated by co-defendant Warme with Detectives Caracappa and Petraglia. To that end, the government adduced testimony from Detectives Caracappa and Petraglia relating to a meeting on March 27, 1978, during the course of which Delli Paoli indicated to Caracappa that a good friend of his named Sam Shafano had received the $20,000 delivred by Caracappa to Warme in order to purchase heroin (192a-194a).

Caracappa further testified that Delli Paoli had indicated to him that Shafano had not yet returned with the heroin, thus indicating that he may have been locked up or that he couldn't obtain the heroin or that perhaps "we took a beat," which latter phrase, in narcotics parlance, indicates that Shafano may have taken off with the money (194a-195a). Caracappa further testified that on a subsequent occasion on the following day he had another meeting with Delli Paoli during the course of which

Delli Paoli indicated that he had been looking for Shafano but couldn't find him, but that he agreed to make up the missing $20,000 (197a). Delli Paoli also allegedly informed Caracappa that he was going to try and get in touch with another connection for some brown heroin to make another deal for the coming week (202a). That line of testimony by Detective Caracappa regarding Delli Paoli's discussion with him of not one but two heroin transactions, as well as Deli Paoli's apparent involvement, on the basis of Caracappa's testimony, with the actual source for the heroin, namely Sam Shafano, when considered in conjunction with the surveillance testimony which tended to indicate that Delli Paoli met with defendant Warme at some critical points during the investigation, presented an evidentiary foundation which, when considered in the light of Delli Paoli's subsequent testimony, abundantly demonstrates the utter lack of probative value of the question of whether petitioner was capable of delivering heroin to the detectives.

Delli Paoli actually testified at the trial below and denied that he had ever engaged in the incriminating conversations with Detectives Caracappa and Petraglia insisting that, quite to the contrary, he had refused to talk to them about any drug transactions whatsoever in which Warme may have himself been involved (694a-697a). Delli Paoli did not even remotely suggest in his testimony that he had engaged in the conversations adverted to by Caracappa, and certainly did not create any issue about whether he really meant business or was instead misleading the undercover agent in order to perpetuate the theft of $20,000. His absolute denial, pursuant to which he asserted that he did not commit the alleged acts adverted to by Detectives Caracappa and Petraglia relating to a narcotics transaction would have completely removed from the case any question of whether he was capable of consummating the heroin transactions being discussed by the undercover agents and Warme even if we were to assume for the sake of argument that it was ever a relevant issue in this case. Thus, just as the prosecutor's justification for

other crimes evidence was repudiated by the court in *United States v. Williams* because the defendant Williams took the stand and as his sole defense, claimed that he did not commit the alleged acts in question at all [*United States v. Williams, supra,* at 191], so too, when Delli Paoli took the stand in this case and as his sole defense claimed that he did not commit any of the acts underlying the charges in Count One of the indictment, the true issue for resolution as to Delli Paoli's guilt or innocence on Count One of the indictment was whether Delli Paoli was telling the truth or whether the jury should instead reject Delli Paoli's relevant testimony and accept the contrary testimony of Detectives Caracappa and Petraglia.

In no conceivable way could the question of whether the defendants actually were capable of delivering narcotics be deemed a relevant issue in this prosecution in light of the way in which the true issue was framed after Delli Paoli gave his testimony. Of course, since the court had erroneously permitted the introduction of the devastating other crimes evidence at a point in time considerably prior to the conclusion of the defendant's case, and in fact even permitted the prosecutor to allude to this type of prejudicial evidence in his very opening statement, the court foreclosed itself from being in a position to properly evaluate the admissibility of the statement by Warme that Delli Paoli had engaged in a $50,000 drug deal in Miami, Florida, at such later time during the trial when he could have properly evaluated all of the relevant evidence on that particular issue.

In so failing to properly handle the other crimes evidence, the District Court judge not only violated the rule requiring that he await the resolution of this issue until after the defendant has completed the presentation of his case, but in the context of this prosecution thus permitted the jury to be alerted from the very outset of the trial of the so-called heroin transaction in Maimi, Florida. The inexorable consequence of this conduct by the

court was to fatally infect the jurors' minds throughout the trial against the defendant Delli Paoli by conveying to them that he was the type of a "bad man" who had engaged in a completely unrelated heroin transaction which might conceivably suggest to the jurors at an early junction of this proceeding that Delli Paoli would thus also be the type of bad man who might commit the crimes with which he was charged in the indictment at trial herein.

Finally, as pointed out by *United States v. Benedetto* and other recent cases such as *Williams and O'Connor,* involving the government's use of other crimes evidence in a criminal prosecution, even if the trial judge had been able to conclude in this case that the other crimes evidence was somehow relevant, that is not the end of the inquiry because Section 403 of the Federal Rules of Evidence also required the judge to weigh the probative value of the evidence against the harmful consequences presented by such highly prejudicial evidence of another unrelated narcotics crime. In the prosecution at bar, even if the other crimes evidence could somehow be deemed relevant to an actual issue in the trial, any such relevance would have been so remote and the necessity for the evidence so minimal, that the court would have been required to exercise its power under Rule 403 to exclude the evidence because of the tremendous potential for prejudice.

This alarming potential for prejudicing the defendant Delli Paoli takes on even added significance in light of the other hurdles barring admissibility in this case in the form of both the fact that there was no proof whatsoever that Delli Paoli had actually committed the crime in question, as well as the significant consideration that the court improperly permitted the jurors to reflect upon this devastating other crimes evidence from the very inception of the trial through both the prosecutor's opening statement as well as the testimony of the first witness called by the government, thus irretrievably infecting the minds of the jurors against Delli Paoli.

(b) The admission into evidence pursuant to Rule 801(d)(2)(E) of the declaration regarding the $50,000 drug deal in Florida, was also violative of the rule prohibiting hearsay testimony. In that connection, the declaration failed to comply with the necessary pre-conditions of admissibility, since the statement was deemed unreliable by the court and, moreover, the other non-hearsay evidence adduced at trial failed to show that the declaration was either made during the course of the conspiracy or that the co-conspirator-declarant had personal knowledge of the subject of his statement.

It has already been argued in Subpoint One (a) of this petition, *supra*, that the court committed reversible error in admitting the statement by Caracappa that Warme had informed him that his connection, namely Delli Paoli, had engaged in a $50,000 drug deal in Miami, Florida, since the admission of that piece of evidence relating to the alleged commission by Delli Paoli of another unrelated crime violated the prohibition against the admission of such "other crimes" evidence for a variety of reasons, all turning upon the conclusion that the only purpose of the admission of this testimony would be to seriously prejudice the interests of Delli Paoli by demonstrating that he was a bad person, thus inclined to commit the drug transactions alleged in the indictment.

In this subpoint, we turn to another independent ground for the exclusion of that piece of evidence, namely that the statement by Caracappa as to the remark made by Warme constituted inadmissible hearsay testimony not subject to the exception relied upon by the District Court judge involving statements by co-conspirators made during the course of and in furtherance of the conspiracy, as that exception is set forth in Rule 801(d)(2)(E) of the Federal Rules of Evidence.

In analyzing the hearsay nature of the statement in question, it is preliminarily necessary to point up once again that the

court admitted the relevant testimony by Caracappa "to establish the fact that these were earnest negotiations by people who had the capability of delivering the heroin and I take it that this is designed to prove that they had such abilities" (140a). And, in that connection the jury was instructed that they could only consider the evidence on the issue of whether the defendants had such an ability to deliver heroin if they first found that the transaction actually had occurred and that the testimony of Caracappa was truthful (145a). It is thus clear that the evidence was admitted by the court for purposes of establishing the truth of the statement allegedly made by Warme to Caracappa that Delli Paoli had engaged in the drug deal in Miami, Florida, albeit for the limited evidentiary inquiry of considering the fact that Delli Paoli engaged in that drug deal, if the jury indeed had found that to be a fact, on the question of whether the defendants were capable of delivering heroin to Detectives Caracappa and Petraglia.

Before admitting a statement of a co-conspirator pursuant to Rule 801(d)(2)(E) it was necessary that the condition of fact set forth in the Rule be fulfilled, to wit, that the statement by co-conspirator Warme be made "during the course and in furtherance of the conspiracy." It has long been the law that the trial judge may not "abdicate his traditional duty to decide those issues of fact which determine the applicability of a technical exclusionary rule," a requirement which clearly applies to hearsay utterances by co-conspirators and which mandates that the trial judge be assured that "the prosecutor has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances" [*United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970)]. That rule requiring the determination of the conditions of fact relating to the admission of co-conspirator's statement has been maintained in accordance with provisions of Rule 104(a) of the new Federal Rules of Evidence [Weinstein's Evidence, paragraph 104[05], page 104-43 (1977)].

Indeed, as pointed out by the above mentioned commentator in his treatise on evidence, Judge Friendly of the Second Circuit had transmitted a letter respecting Rule 104(b) in 1970 to the Committee on Rules of Practice and Procedure, relating to hearings before the Special Sub-committee on Reform of Federal Criminal Laws of the Committee on the Judiciary of the House of Representatives, in which he expressed his view that trial judges should be required to make a predetermination of whether such a condition of fact has been fulfilled [Weinstein's Evidence, paragraph 104[05] page 194-41 at footnote 12].

In the District Court below, the judge, when confronted with the relevant hearsay objection by counsel (138a-141a), gave no indication as to whether the court had itself made a determination as to whether the conditions of fact had been fulfilled, but merely saw fit to give the following limiting instruction to the jury:

> "Moreover, the testimony which is being received is, as I mentioned earlier, the statement of one alleged co-conspirator concerning the acts of another alleged co-conspirator. They aren't admissible against the other alleged co-conspirator until the existence of the conspiracy and the participation of the other alleged co-conspirator have been established by extrinsic evidence: (150a).

An examination of the record of the trial seems to confirm the fact that the trial judge did not see fit to ever make a final determination of his own as a pre-condition to permitting the statement by Caracappa that Warme had told him about Delli Paoli's involvement in a drug transaction in Florida. This violation of the judge's responsibility imposed by Rule 104(a) as well as relevant decisions such as *United States v. Geaney, supra,* resulted in a turn of events which in and of itself constitutes grounds for a reversal of the judgment of conviction in light of the fact that the isntructions actually given at the time the statement was admitted into evidence, were clearly insufficient, as well as confusing and misleading.

Before turning to an examination of the manner in which the court erred in giving the isntructions it deemed appropriate in connection with the co-conspirator's declaration, we first examine the numerous other reasons which appear in the record which demonstrate the inadmissibility of the declaration by Warme as violative of the hearsay rule, in light of the clear inapplicability of the co-conspirator declaration exception set forth in Rule 801(d))2)(E), as that exception has been interpreted by this court.

In determining whether the pre-conditions set forth in Rule 801(d)(2)(E) have been fulfilled, it is now clear that the court is not only required to find, on the basis of the non-hearsay evidence adduced at trial, that the declaration is in furtherance of the conspiracy, but the court must also make a "determination that there is sufficient other evidence to establish that the defendant against who the declaration is offered was a member of the conspiracy when the declaration was made" [*United States v. Puco,* 476 F.2d 1099, 1107 n. 2 (2d Cir. 1973) *cert. denied,* 414 U.S. 844 (1973)].

The *Puco* court also clearly underscored yet another pre-condition which requires that in addition to a determination of whether the Rule 801 pre-conditions have been met, the court must also determine whether the "statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination" [*United States v. Puco, supra* at 1107]. This additional requirement imposed by *Puco,* that "the trial court must, despite the fact that it may have already determined that the extra-judicial statement falls within an exception to the hearsay rule, specifically determine, prior to deciding whether to admit the statement, that *** the statement must bear sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration," has recently been reaffirmed by this court [*United States v. Oates,* 560 F.2d 45, 81 (2d Cir. 1977)].

Even the most cursory evaluation of the other non-hearsay evidence adduced at trial, readily demonstrates that the admission by the trial court of the hearsay statements regarding the Miami drug deal pursuant to Rule 801(d)(2)(E) was violative in two separate regards of the principles discussed in *United States v. Puco.* To begin with, there was no evidence whatsoever adduced at trial which was indicative of the reliability of the statement. Delli Paoli himself vehemently denied that he had engaged in any such narcotics transaction in Florida, and the court itself recognized, and made it crystal clear at the time of Delli Paoli's sentence, that it was the court's own personal view of the facts that the statement by Warme to Caracappa relating to Delli Paoli's involvement in the Miami drug deal was nothing more than "puffery" (816a.2-816a.3). Inasmuch as it was the court's responsibility to determine, prior to deciding whether to admit the statement, whether the statement bore sufficient indicia of reliability, there is absolutely no room for argument in light of the court's own view that the statement was untrue and was merely voiced by Warme as "puffery" on his part, that the statement should have been excluded on that ground alone, especially in light of the absolute dearth of any evidence in the record which would otherwise tend to indicate the reliability of the statement.

Additionally, one of the other pre-conditions for admissibility, as underscored by the *Puco* court, required that the District Court make a pre-determination that there was sufficient other evidence to establish "that the defendant against whom the declaration is offered was a member of the conspiracy when the declaration was made" [*United States v. Puco, supra,* at 1107]. As to that, the record reveals that apart from the hearsay declarations of co-defendant Warme to undercover agents, there was no "other evidence" adduced at the trial which would tend to demonstrate that Delli Paoli was a member of the conspiracy "when the declaration was made" on March 16, 1978 (136a-144a). All of the other non-hearsay evidence in the record

pertaining to Delli Paoli relates to occurrences which transpired subsequent to March 16, 1978, and all of that other evidence falls woefully short of the mark in demonstrating in any fashion that Delli Paoli had become a member of the conspiracy alleged in the indictment prior to March 16, 1978.

Yet another reason for excluding the statement is predicated upon the obvious fact that Richard Warme, the co-conspirator declarant, had no personal knowledge of the subject of his statement relating to the purported drug deal in Miami, Florida. As pointed out by Judge Weinstein in his treatise on the subject, there is a great "possibility of prejudice *** in admitting statements whose reliability is suspect. To obviate this possibility *** Rules 805 and 403 should be interpreted as requiring the declarant to have personal knowledge of the facts to which his statement relates" [Weinstein's Evidence, paragraph 801(d)(2)(E) [01] page 801-158 (1977)].

Finally, it seems clear that further error was committed by the court below when, in opting to submit the question of the admissibility of the co-conspirator Warme's declaration to the jury, the court both seemingly abdicated its own responsibility to finally determine the question of admissibility and, in so doing, also gave erroneous instructions on the subject.

To begin with, the instruction given by the trial judge at the time the statement was first admitted into evidence was insufficient as a matter of law inasmuch as the court failed to instruct the jury that it was necessary that the statement be made in "furtherance of the conspiracy," as required by Rule 801(d)(2)(E).

Moreover, the court's attempts to instruct the jury that the rule required that the co-conspirator's declaration could not be considered until such time as the conspiracy had first been established to their satisfaction by independent non-hearsay

evidence fell far short of the mark and was somewhat confusing. Instructing the jury that the statements "aren't admissible" until the existence of the conspiracy and the participation of Delli Paoli "have been established by extrinsic evidence (150a), could only have tended to obfuscate the situation. There is no conceivable way the jurors could have known what the court meant by "extrinsic evidence" in the absence of a far more detailed exposition on that point, and the other instruction that the statements "aren't admissible" certainly does not tend to admonish the jurors that they should not consider the co-conspirator's declarations until they have first determined that there was sufficient independent non-hearsay evidence of the other relevant factors.

Moreover, having seen fit to give the question of whether the declarations regarding the Florida drug deal by co-conspirator Warme were admissible to the jury at a point, in time when no other evidence had yet been adduced of either Delli Paoli's part of the conspiracy or indeed any evidence at all proving a conspiracy between Warme and Delli Paoli, the danger of bootstrapping, especially since the jury was actually given the issue of admissibility, required a proper cautionary instruction and, an instruction given at the end of the trial is not deemed to correct the erroneous refusal to give the proper cautionary instruction when it was first required [*United States v. Jackson,* 536 F.2d 628, 630 (5th Cir. 1976)].

While the court did eventually see fit to again give the question of admissibility to the jury during its formal charge at the conclusion of the trial (763a-764a), it seems clear to us that the judge's abdication of his responsibility to decide the question of admissibility himself as well as his giving of faulty jury instructions when the evidence was first introduced, renders the later instructions nugatory and does not in any fashion detract from the conclusion that reversible error was committed in that context.

POINT TWO

REVERSAL OF THE JUDGMENT OF CONVICTION IS REQUIRED BECAUSE OF THE MISCONDUCT ON THE PART OF THE PROSECUTOR IN INTENTIONALLY INJECTING INTO THE TRIAL THE SPECTRE OF ORGANIZED CRIME WITHOUT ANY LEGITIMATE PURPOSE.

When the prosecutor announced at the very outset of the trial, during his opening statement, that he intended to demonstrate that the defendant Delli Paoli had been involved in a $50,000 drug transaction in Miami, Florida, it had not yet become clear that the government intended to utilize not only this highly prejudicial piece of "other crimes" evidence in its effort to convict the respecive defendants, but that they had also fully intended from the very outset, to adduce yet another hearsay declaration from the lips of Richard Warme for the exclusive purpose of persuading the jury that Orlando Delli Paoli, who was referred to during the trial as the "old man" (46a, 111a-112a), was connected to organized crime. This reference to the purported association of the defendants to an organized crime syndicate had the unavoidable impact of seriously prejudicing the rights of the petitioner to a fair trial with the result that the judgment of conviction must be reversed.

It has already been demonstrated in *Point One, supra,* that the introduction of the hearsay declaration by co-conspirator Richard Warme pertaining to Delli Paoli's alleged involvement in a Miami drug transaction in and of itself constituted reversible error on a variety of substantial grounds. Moreover, it is patently clear that the government saw fit to adduce the testimony of Caracappa pertaining to Warme's hearsay declaration of the Miami drug deal (137a) directly on the heels of two other related pieces of testimony relating to hearsay statements by Warme that his heroin connection was "an old man and a

made man" and that "the old man was hooked up with Fat Tony Salerno and the old Pleasant Avenue people" (124a).

An examination of the segments of the record containing the remarks of counsel after objections had been raised to both the statement pertaining to Delli Paoli's alleged involvement in a Miami drug deal, as well as the statement suggesting that Delli Paoli was "connected" to Fat Tony Salerno, who has on many occasions been portrayed in the press and by various law enforcement agencies as a high profile member of organized crime, readily reveals the prosecutor's purpose in adducing those items of testimony. In fact, the prosecutor urged the court to permit him to demonstrate that Delli Paoli was "connected, he is heavy, he is a high level drug dealer" (128a), so that he could later argue in summation that "in fact Mr. Delli Paoli is connected, he is not an innocent person***" and that he was a "made man" (128a-130a).

When the District Court judge pointed out to the prosecutor that the name Fat Tony Salerno "sounds like somebody in organized crime," and underscored the highly prejudicial nature of the remark, the prosecutor finally relented and agreed not to refer to Fat Tony Salerno "anymore" (130a-131a). However, it is our view that irretrievable damage had already been suffered by petitioner.

The District Court judge quickly repudiated the prosecutor's attempt at persuading the court that his endeavor to demonstrate to the jury that the defendants were connected to organized crime was a legitimate line of inquiry, and the court gave what it deemed to be an appropriate instruction to the jury directing them to disregard the testimony pertaining to the "connection of one of the members of this alleged conspiracy with certain other persons" (144a).

There is no longer any room for argument about the proposition that an attempt by a prosecutor to inject the spectre of organized crime into a criminal prosecution for no legitimate purpose constitutes reversible error [*United States v. Love,* 534 F.2d 87 (6th Cir. 1976)]. Moreover, because of the highly prejudicial nature of such evidence tending to associate a criminal defendant with organized crime, which becomes indelibly etched upon the minds of the jurors and precludes them from fairly judging the remainder of evidence presented, it has also been held that the rendering of a cautionary instruction directing a jury not to consider evidence that a defendant in a criminal case is connected to organized crime will not necessarily serve to remedy the irreparable harm so as to save the prosecution from reversal just because such an instruction is given to the jury [*United States v. Love, supra* at 89].

In the case at bar, the egregious conduct on the part of the prosecutor certainly cannot be characterized as harmless. We are not dealing with one isolated reference to the connection of Delli Paoli to an organized crime figure, but to a concerted endeavor by the government to portray Delli Paoli as a well connected individual with high level connections in both the sphere of organized crime as well as in the narcotics' business.

While the judge did render a cautionary instruction relating to the testimony that Delli Paoli was connected to Fat Tony Salerno and the Pleasant Avenue people, he failed to recognize that the other reference to the alleged drug deal in Miami, Florida in and of itself served to prejudice the rights of the petitioner in a very similar regard. Considered in tandem, the references to Delli Paoli's purported involvement with both organized crime figures as well as unrelated narcotics' transactions along with the reference that he was a "made man," served to permeate the record with undue prejudice which could not possibly have been neutralized by the court's instructions to the jury to merely disregard the remark relating to Fat Tony Salerno and the Pleasant Avenue people.

The jury was permitted to hear all of these prejudicial statements from the mouth of the same witness during the course of the very line of testimony designed by the government to portray Orlando Delli Paoli as a well connected "made man" who had engaged in a major unrelated narcotics transaction in Miami, Florida, and who was "hooked up" with Fat Tony Salerno, a reference which the court itself viewed as an effort by the prosecutor to inject into the case the spectre of organized crime. Quite apart from the obvious impact that the prosecutor's intentional injection of the organized crime spectre must be deemed to have had upon the members of the jury, the reversible dimension of the misconduct is further underscored by the fact that the jury saw fit to return a verdict of not guilty on Counts Five, Six, Seven and Eight of the indictment despite the fact that the very same government witnesses whose testimony was designed to support the first four counts of the indictment also provided the testimonial foundation for the latter counts which resulted in acquittal.

In light, therefore, of the jury's apparent willingness to repudiate certain aspects of the testimony of the government's primary witnesses and to instead accept the conflicting testimony adduced on behalf of the defendant, it is impossible to conclude that the impression left by the prosecutor's endeavor to adduce the evidence portraying Delli Paoli as a well connected individual in organized crime did not serve to prejudice the rights of the defendant to a fair trial, guaranteed to him by the due process clause of the Fifth Amendment.

POINT THREE

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INVOKE APPROPRIATE SANCTIONS SUCH AS THE STRIKING OF DIRECT TESTIMONY OF VARIOUS GOVERNMENT WITNESSES WHO CONCEDED THAT THEY HAD INTENTIONALLY DESTROYED VARIOUS REPORTS OF THEIR INVESTIGATIONS WHICH MATERIAL, IN ALL RELEVANT INSTANCES, HAD A SIGNIFICANT RELATIONSHIP TO THE SUBJECT MATTER OF DIRECT EXAMINATION.

During the course of the trial, it became clear that numerous witnesses for the government had deliberately destroyed handwritten reports pertaining to their investigation of the relevant events which led up to the indictment in this case. In all of the instances, the witness disclosed that the subject matter of his handwritten reports or notes, as the case may be, was subsequently transformed into the actual typewritten reports which were furnished to the defendants as "3500" material. Consequently, from the standpoint of relevance in terms of possible usage for cross-examination during the course of the trial, there is no dispute over the fact that all of the factual material which had been contained in the handwritten reports or notes prepared by the agents constituted producible material under Section 3500 of Title 18 of the United States Code.

Before turning to an examination of the actual material which was deliberately destroyed by the various governmental witnesses, all of whom were law enforcement agents, it is necessary to direct our attention to pronouncement in *United States v. Bufalino* [576 F.2d 446 (2d Cir. 1978)], where the Second Circuit indicated that it would look with an "exceedingly

jaundiced eye" upon future efforts to justify non-production of a Rule 16 or Jencks Act "statmeent" by reference to "departmental policy" or "established practice" or "anything of the like." The *Bufalino* court went on to indicate in no uncertain terms that where, as in the case at bar, "destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator's motivation, unless the government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant" [*United States v. Bufalino, supra,* at 449]. Finally, *Bufalino* made the observation that inasmuch as courts are not in a position to speculate whether such statements could have been utilized effectively at trial, the harmless error doctrine must be strictly applied in such cases involving deliberate destruction [*ibid.*, at 449]. *Bufalino* was the aftermath of several earlier decisions by the Second Circuit in which law enforcement agencies were admonished that they should "retain the handwritten notes until the prosecution is terminated" [*United States v. Mase,* 556 F.2d 671, 676 (2d Cir. 1977)]. Despite these warnings, the agents in this case proceeded to destroy their notes.

Even the most cursory analysis of the manner in which every government witness who took notes in this case saw fit to deliberately destroy their handwritten reports in the prosecution at bar, will readily underscore that the imposition of appropriate sanctions by the District Court, in accordance with *Bufalino,* which decision of the Court of Appeals was pointed out to the District Court at the time that the destruction of the material became obvious during the examination of the witnesses, was wrongfully repudiated by the District Court and the Second Circuit on the ground that *Bufalino* was filed after the investigation in this case was completed.

Turning to the relevant testimony of Detective Caracappa on the subject of the deliberate destruction of his handwritten notes, it appears that this witness had prepared 24 separate

reports pertaining to his activities during the course of the 3 month investigation leading up to the indictment of the defendant herein (396a). In that connection, 25 separate typewritten reports were furnished to counsel for the defendant, which reports were numbered 3501A to 3501Y, and which were deemed by the government to constitute 3500 material (396a). Caracappa indicated that he did not himself type any of the 3500 reports which actually were turned over to counsel for the defendant, but had instead handwritten all of those 25 reports on yellow note paper, either on the day of the occurrence or the next day (397a), which handwritten reports were eventually turned over to a typist in order to be committed to a typewritten report, which typewritten reports were submitted to the defendants asa 3500 material (397a).

As further made clear by Detective Caracappa's testimony, these reports not only contained his relevant observations during the course of the investigation, but also reflected conversations he had engaged in with the defendants who were brought to trial (401a-409a). Caracappa indicated that after he had received the typed copy which eventually became the 3500 material furnished to defense counsel, he destroyed his handwritten reports which had been given to the typist (409a).

Inasmuch as Detective Caracappa was the most significant witness to give testimony in the case against the defendant, and his handwritten reports reflected the entire investigation, including the statements allegedly made by the defendant Delli Paoli without which there was no possible way that the prosecution could have spelled out a *prima facie* case, it does not seem conceivable that the government can even begin to bear their extremely heavy burden of demonstrating that no prejudice could have resulted to Delli Paoli as a result of the non-availability of all of Caracappa's 25 separate and distinct handwritten reports of his investigation in this case.

Another important witness who also admitted he had destroyed certain handwritten notes he had made of his surveillance of the defendant Delli Paoli was Agent John Mullen, who provided some rather significant surveillance testimony pertaining to the crucial events which took place on March 27, 1978, the date upon which $20,000 was allegedly given to co-defendant Warme by Detectives Caracappa and Petraglia.

Mullen testified that on March 27, 1978 he was conducting a surveillance of the respective defendants in the case at bar in the vicinity of the Andrea Motel, where many of the more significant events pertaining to the trial took place (470a). It was Agent Mullen's testimony that he had made handwritten notes contemporaneously with his observations on March 27, 1978 pertaining to the events which he had observed while on duty in connection with the investigation (472a-475a). Mullen also conceded that it was not until two weeks after having made the obsevations that he utilized those notes to prepare the 3500 report which eventually was turned over to the defendant and which pertained to his observations on March 27, 1978, making the significant admission in that regard during a *voir dire* examination that the 3500 report pertaining to that day's observation "depended exclusively and wholly upon the notations that [Mullen] had in [his] possession at the time [he] prepared the report" (476a). Finally, Mullen conceded that it would have been extremely difficult to ever have prepared the 3500 report which had been typewritten from his notes if he did not have access to the notes which he eventually destroyed (477a).

The nature of the testimony given by Detective Mullen underscores the tremendous prejudice which flowed towards the petitioner Delli Paoli as a result of the destruction of the notes without which Mullen could not possibly have prepared his final typewritten 3500 reports. In that connection, it is important to bear in mind that in acquitting Delli Paoli of Counts Six, Seven

and Eight, the jury seemingly refused to credit any of the testimony given by Detectives Caracappa and Petraglia as to those substantive narcotics counts against Delli Paoli, but nevertheless convicted Delli Paoli of the conspiracy count of the indictment, the proof of which also relied in significant part upon certain testimony given by Detectives Caracappa and Petraglia.

The reason for this seems somewhat clear, inasmuch as the prosecutor himself during his summation, sought to have the jury accept the testimony of Detectives Caracappa and Petraglia against Delli Paoli by indicating that in certain regards that testimony was corroborated by the observations made by surveillance agents (722a-730a). In that regard, the prosecutor asked the jury to believe that Caracappa and Petraglia in fact met with Delli Paoli at the Andrea Motel on March 27, 1978 at or about 11:00 p.m. of that evening despite the contrary testimony of defendants Delli Paoli, Diane Warme, as well as defense witness Fiorentino, that no such meeting ever took place, but that quite to the contrary, the only meeting between those parties at the Andrea Motel was much earlier in the afternoon of March 27, 1978 at about 5:30 (590a-595a, 673a, 714a-718a).

Inasmuch as it is clear that the jury repudiated the testimony of Detectives Caracappa and Petraglia pertaining to the substantive counts against Delli Paoli, in connection with which there was no testimony by any surveillance agents which would tend to corroborate the testimony given by Caracappa and Petraglia, it is reasonable to conclude that the corroborating surveillance testimony of Agent Mullen as to the events of March 27, 1978 played a significant role in persuading the jury to convict Delli Paoli of conspiracy predicated upon Caracappa's version of the events of March 27 which provided the most damaging evidence against appellant Delli Paoli.

If the jury had believed the testimony of Delli Paoli and Diane Warme that they had met with agents Caracappa and Petralgia at the Andrea Motel at about 5:30 p.m., which was a relatively short time after Caracappa had given the $20,000 to Richard Warme, the testimony related by Caracappa about Delli Paoli having dealt with Sam Shafano in order to purchase $20,000 worth of heroin would have been irreparably undercut. Only through the device of telling the jury that Delli Paoli had some six hours, between about 5:00 p.m. until 11:00 p.m. on March 27, 1978, within which to allegedly engage in his convoluted dealings with Shafano which, according to Caracappa, involved the passage of $20,000, the subsequent non-appearance of Shafano, and the search for his whereabouts, was the prosecution able to present a palatable factual picture regarding Delli Paoli's involvement in the most crucial segment of the prosecution against him.

The notes which were deliberately destroyed by Agent Mullen pertaining to his observations made on March 27, 1978, which notes were made contemporaneously with the observations, at a time prior to Mullen having any opportunity to consult with any of the other members of the team conducting this investigation, including Caracappa and Petraglia, were destroyed, thus depriving the defense of the opportunity to utilize them in connection with the cross-examination of Mullen as to the crucial issue of what time the meeting between Delli Paoli and the agents at the Andrea Motel took place on March 27, 1978. That deprivation alone constituted enormous prejudice and, of course, stands in the way of the government sustaining their burden of demonstrating that the deliberate destruction by Mullen of his notes did not prejudice Delli Paoli.

In light of the fact that Delli Paoli was acquitted of the substantive narcotics counts in the indictment, it seems fair to conclude that the testimony given by Agent Mullen as to his observations of Delli Paoli on the day in question, namely

March 27, 1978, played a very large role in persuading the jurors to convict Delli Paoli of the crime of conspiracy. Inasmuch as counsel for Delli Paoli was deprived of an opportunity to meaningfully examine Agent Mullen in order to determine whether his testimony as to his relevant observations of Delli Paoli on March 27, 1978 was accurate and truthful, there seems little question but that the government cannot possibly demonstrate to this court that Delli Paoli was not prejudiced by the destruction by Agent Mullen of his notes.

It has been well settled for some time now that "notes and reports of agents of the government, made in the course of a criminal investigation, are the proper subject of inquiry and subject to production under the Jencks Act" [*Lewis v. United States,* 340 F.2d 678, 682 (8th Cir. 1965) and cases cited therein]. Indeed, in the recent case of *Goldberg v. United States* [425 U.S. 94, 109-111 (1976)], the Supreme Court of the United States had occasion to observe that the government itself had conceded in that case that the handwritten statements of a government witness represent "statements" pursuant to 18 U.S.C. §3500(e)(1). It seems clear to us that all of the various reports by Caracappa, as well as the contemporaneous notes of surveillance agents which had been deliberately destroyed by the government witnesses in this case clearly constitute "statements" within the purview of the aforementioned segment of section 3500 and, in the case of those segments of Caracappa's report containing statements made by defendants, also constituted discoverable Rule 16 material.

Turning to the question of whether sanctions should be imposed, we note that an application was made on behalf of all the defenants to strike the direct testimony of each witness who destroyed his notes (409a, 459a, 474a).* At the very least, the deliberate destruction of the material mandates "the exclusion or suppression of other evidence concerning the subject matter of the undisclosed material" or, in the context of this case, since

*The court had permitted any of the defense lawyers to make an objection on behalf of all defendants to whom the objection was applicable (648a.1-648a.2).

all of the important government witnesses destroyed their notes, the indictment should be dismissed [*United States v. Miranda,* 526 F.2d 1319, 1324, n. 4 (2d Cir. 1975)].

POINT FOUR

WHILE THE INDICTMENT CHARGED ONE NARCOTICS CONSPIRACY, THE PROOF ESTABLISHED MULTIPLE NARCOTICS' CONSPIRACIES. THIS VARIANCE BETWEEN INDICTMENT AND PROOF FATALLY PREJUDICED SUBSTANTIAL RIGHTS OF PETITIONER DELLI PAOLI.

In the trial of this indictment, the District Court Judge himself manifested a substantial concern about whether the government's proof had established several conspiracies, in violation of the relevant precedents of this court. Indeed, at the time of sentencing, the court stated that "there is a substantial issue about the possibility of a double conspiracy in there, and we discussed it at great length during the trial" (816a.1). Turning to the relevant law on the subject of multiple conspiracies, it is clear that whenever a conviction has "been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof discloses multiple conspiracies, the error of variance has been committed" [*United States v. Bertolotti,* 529 F.2d 149 (2d Cir. 1975), citing *Berger v. United States,* 295 U.S. 78 (1935); *Kotteakos v. United States,* 328 U.S. 750(1946)]. In analyzing the multiple conspiracy argument raised in *Bertolotti,* the Court of Appeals took note of the fact that the Second Circuit had gone to substantial lengths in finding single conspiracies in narcotics cases. Judge Van Graafeiland, writing for the court, went on to note that "[T]he common thread running through these cases is treatment of them as general, albeit illegal business ventures. *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974) *supra,* at 976." [*United States v. Bertolotti, supra* at 154-155]. As in many cases decided on this

point it seems clear that in the indictment at bar, the government "has merely merged several conspiracies for the sake of convenience" [United States v. Bertolotti, supra at 155, and cases cited therein]. Careful analysis of the evidence in the trial below demonstrates beyond question that the several narcotics transactions centering around Richard Warme "could hardly be attributed to any real organization, even a 'loose-knit' one" [*Ibid.,* citing *United States v. Miley,* 513 F.2d 1191, 1206-1207 (2d Cir. 1975)]. Just as in *Bertolotti* and *Miley,* there was no evidence whatsoever in the case at bar to show that Warme and his respective co-conspirators in the various narcotics transactions alleged in the indictment "were conducting what could seriously be called a regular business on a steady basis" [*Id.*]. The only common denominator in all of the several conspiracies demonstrated at trial was that defendant Richard Warme was seeking to obtain narcotics sources who could sell drugs to Detective Caracappa and Petraglia, which various sources were named by the government as co-conspirators. However, it is clear that the one separate conspiracy between Richard Warme and defendants Isaza and Petrucha, embodying Counts Three and Four of the indictment and relating to narcotics transactions which transpired on March 2 and March 9, 1978, were totally unrelated to the alleged transaction embodied in the substantive counts found in Counts Six, Seven and Eight of the indictment relating to alleged drug transactions which took place on March 29, March 30 and March 31 of 1978.

And while the government had seen fit to charge Wayne Petrucha and Victor Isaza in Count Six of the indictment with the substantive crime involving the narcotic drug of cocaine, not only is there no evidence whatsoever in the record at trial which would tend to support any conspiracy between Warme, Delli Paoli, Isaza and Petrucha regarding the events of March 29th, but quite beyond that, on the basis of the testimony adduced by the government it is clear that on March 29th Warme ripped Petrucha and Isaza off for the cocaine (361a, 379a, 384a,

391a-394a) involved in the substantive count relating to the alleged transaction of March 29, 1978.

The impact of the proof at trial of multiple conspiracies, one between Warme, Isaza and Petrucha, another between Warme and Delli Paoli and still another between Bolella and Warme, relating to Count Two, requires that this court take special cognizance of the fact that none of the defendants were convicted of any of the substantive narcotics counts embodied by Counts Six, Seven and Eight of the indictment. As a consequence, petitioner Delli Paoli was only convicted of the conspiracy charge found in Count One of the indictment. Since the acquittals of Delli Paoli on all of the substantive counts very strongly suggests a rejection by the jurors of the pertinent testimony given by Caracappa and Petraglia relating to the alleged conversations between Delli Paoli and the undercover officers, and since there was no evidence whatsoever that Delli Paoli had transferred any narcotic drugs to any individual involved with this case, it is impossible for the government to demonstrate to this court that Delli Paoli was not seriously prejudiced by the proof of the other conspiracy between Warme, Isaza and Petrucha during the course of which drugs were transferred to the undercover agents and which incidents resulted in convictions on the substantive counts involving those individuals. This is especially so in light of the hearsay evidence by Victor Isaza to Caracappa, that Isaza and Petrucha would get Caracappa a source for heroin (115a), a hearsay declaration which may well have seriously prejudiced Delli Paoli, who was later characterized by Warme as his heroin source [*United States v. Miley, supra,* at 1208].

Since it is clear that a variance was demonstrated between the indictment and the evidence, multiple conspiracies having been proven, the inquiry must proceed to one of whether the variance is material—that is, whether it affected the substantial rights of Delli Paoli [*Berger v. United States,* 295 U.S. 78, 82

(1935); *United States v. Agueci,* 310 F.2d 817 (2d Cir. 1962); *United States v. Miley, supra*].

In *United States v. Berger,* 73 F.2d 278, 280 (2d Cir. 1934) rev'd on other gds., 295 U.S. 78 (1935), the court discussed the way in which substantial rights could be sufficiently affected in order to make the variance material and thus require reversal. More specifically, the court wrote in *Berger* that the variance is material where surprise hampers the presentation of the defense or where, as in the case at bar, "It will allow the production of evidence not competent or material to the crime he [the defendant] had committed." Here, all of the evidence involving the transactions which were consummated between Warme, Petrucha and Isaza and which relevant testimony was credited by the jury which convicted on substantive Counts Three and Four were all placed before the jury for their consideration. In *United States v. Miley, supra,* the court cited *Berger v. United States, supra,* for the proposition that where multiple conspiracies were proved, the true inquiry becomes whether substantial rights of the accused were affected [see also *United States v. Bertolotti, supra* at 155-158].

In the instant case, the jury was charged that even if more than one conspiracy was proved the defendants could nevertheless be convicted, providing the jury concluded that the single conspiracy charged in the indictment was proved (763a). Under this charge, the jury was permitted to view all the evidence including, of course, the drug transactions between Warme, Isaza and Petrucha, and the hearsay utterances by Isaza that he and Petrucha would obtain a heroin source for Caracappa.

In light of the verdict, it is fair to say that the ample proof of the other conspiracies were, therefore, attributable to Delli Paoli and he was convicted. It seems dangerous to speculate as to the basis of a jury verdict under any circumstances. Here,

where the verdict is a general one and the charge is conspiracy, involving several co-defendants, such a practice should be employed only with extreme caution [*cf. United States v. Rosner,* 516 F.2d 269, 275 (2d Cir. 1975) cert. den. 427 U.S. 911 (1976)].

An alternative mode for determining the prejudicial impact of the variance is by analyzing the spill-over effect which may be found in joint trials [*United States v. Bertolotti, supra,* at 156]. Here, the trial lasted nearly three weeks. In terms of the activities testified to, while the alleged conspiracy spanned three months, from January, 1978, through the end of March, 1978, the non-hearsay evidence against Delli Paoli related to three meetings between Delli Paoli and the undercover agents on March 27 and March 28, 1978.

The trial here involved three other defendants as to whom proof was adduced that narcotics was actually delivered to the undercover agents in stark contrast to Delli Paoli's situation, and was a case where "[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconscious or otherwise, are so great that no one can really say prejudice to a substantial right has not taken place." [*Kotteakos v. United States,* 328 U.S. 750, 774 (1946)].

Under the circumstances reversal is mandated and a new trial is required.

Before concluding, however, we deem it appropriate to address some additional observations to a closely related matter. After jury selection but prior to the government's opening statement, counsel for appellant alerted the trial court to the fact that Delli Paoli was entitled to a severance on the ground of misjoinder and addressed the fact that the instant indictment improperly joined multiple unrelated conspiracies (51a-52a).

The court's refusal throughout the trial to grant a severance grounded upon the misjoinder of the multiple conspiracy count, viewed in light of the prejudice to the petitioner created by the joinder herein, as already discussed in detaill above, warrants reversal as a matter of law [*cf. United States v. Miley, supra* at 1209-1210].

As aptly observed by Judge Friendly in *Miley,* wherein, it must be recalled, all of the appellants had been charged in the very same conspiracy count:

> "Absent the conspiracy count, we doubt that the joinder requirement of Fed. R. Crim. P. 8(b) could be met, since not all the appellants were otherwise 'alleged to have participated in the *same* act or transaction or in the *same* series of acts or transactions constituting an offense or offenses' (Emphasis supplied)". [*Supra* at 1209; see also the cases and authorities cited therein.]

The court in *Miley* went on to ntoe that since the joinder therein was technically proper because of the existence of the conspiracy count and since there was insufficient prejudice to make the variance fatal, the denial of severance was not deemed a basis for reversal. However, in the case at bar, the manifest prejudice to Delli Paoli requires ar eversal because of the court's refusal to grant a severance.

In that connection, the *Miley* court issued the following admonition:

> "Accordingly, since we have been unable to discern any prejudice from the joinder, we are unwilling to reverse because of denial of the motions for severance, as we surely would under the circumstances of this case if any prejudice had been shown. We trust that heed by prosecutors in this circuit to our observations in *United States v. Sperling, supra,* 506 F.2d at 1340-41, will prevent such vexing problems from arising in the future." [*United States v. Miley, supra* at 1210].

The strong admonition contained in *Miley,* which was decided by the court well before the commencement of Delli Paoli's trial, must be adhered to, with the result that his conviction should be reversed.

POINT FIVE

THE DISTRICT COURT ERRONEOUSLY FAILED TO SUA SPONTE CONDUCT AN EVIDENTIARY HEARING IN ORDER TO DETERMINE WHETHER A RIFT WHICH HAD DEVELOPED BETWEEN PETITIONER DELLI PAOLI AND HIS ATTORNEY PRECLUDED TRIAL COUNSEL FROM PROVIDING EFFECTIVE ASSISTANCE TO HIS CLIENT.

On the very morning of August 2, 1978, the day Delli Paoli was slated to take the stand to give testimony in his own behalf, the following colloquy took place:

> "MR. GREENBERG: Your Honor, I think Mr. Delli Paoli has something he wants to say to the court.
>
> "DEFENDANT DELLI PAOLI: I don't know what to say. He doesn't want to represent me, unless I give him the balance of h is money today, this minute. How am I going to do that? After the day is over, I said my son is trying to make arrangements. He said he doesn't want to know anything, he threatened me.
>
> "I don't know what to do, your Honor. I told him to wait until tonight. My family is trying to make arrangements to get some initial funds that he has coming to him, and that is all I can say, your Honor.
>
> "MR. GREENBERG: I have no comment to make, your Honor.
>
> "THE COURT: I have nothing to rule on. Do you have an application, Mr. Sear [the prosecutor]?" (642a-643a).

It is the position of petitioner that the District Court judge failed to recognize his obligation to undertake an inquiry as to

whether the allegation made by Delli Paoli that his attorney had threatened him in a dispute over the payment of the balance of his legal fee and, in that connection, to have conducted a further inquiry into the question of whether, presuming the statement of Delli Paoli to have been accurate, his trial counsel was thereby precluded from rendering effective assistance to Delli Paoli during the crucial remaining portions of the trial. Needless to say, the allegation made by Delli Paoli that his attorney had threatened him over the subject of the payment of his fee and had indicated to Delli Paoli that he no longer wished to represent him, constituted a very serious charge which should have instantaneously inspired the court to conduct a far more extensive inquiry than it chose to do in the circumstances.

Even if the court held the view that at the time that the allegation was made by Delli Paoli his counsel had been adequately representing Delli Paoli's interest, the court still would have been obliged in light of the remarks by Delli Paoli to have conducted an evidentiary hearing in order to determine whether the dispute between lawyer and client over the subject of the fee arrangements in and of itself created the potential for the denial to Delli Paoli of the effective assistance of counsel guaranteed to him by the Sixth Amendment [*Cross v. United States,* 392 F.2d 360, 366-367 (8th Cir. 1968)].

In the *Cross* case, the 8th Circuit Court of Appeals noted that "the trial was certainly not a sham or a mockery of justice and in fact was probably, as Judge Young noted, the best tried criminal case of that term [*Cross v. United States, supra,* at 367]. Nevertheless, the *Cross* court determined that an evidentiary hearing was necessary to evaluate the question of whether the dispute which had arisen over the payment of the attorney's fee served to deny his client the assistance of counsel, indicating, in that regard, that while the court sympathized with the attorney's desire to collect his fee, "his lack of success in this respect is no reason for his pique disrupting the judicial process" [*Cross v. United States, supra,* at 367].

Of course, in the event that this court agrees with petitioner that there are numerous other grounds which have been set forth in the other points of this petition and of themselves require a reversal of the judgment of conviction, it will not be necessary to inquire any further into the question presented in this point regarding the court's obligation to have inquired further on the matter of the effective assistance of counsel. If it does become necessary for this court to review the arguments contained in this point, it is ncessary that several potential items of evidence to be adduced upon remand be underscored for this court's consideration. We feel it appropriate to make the following observations, by way of an offer of proof, in light of the unique nature of this case.

To begin with, this firm has been informed by petitioner Delli Paoli that in the midst of the dispute over the payment of fees, which occurred shortly before the colloquy quoted above, the lawyer indicated that if the balance of his fee was not paid immediately he would merely have to ask "one question" of the petitioner during his trial testimony scheduled for that day, with the result that he would spend "the rest of your life in jail."*

In that connection, this firm has been apprised by another attorney who participated in the trial in the District Court, that if he were called to give testimony at an evidentiary hearing, he would be in a position to confirm the foregoing statement made to Delli Paoli by his attorney.

It should also be pointed out that an occurrence which took place during the direct examination of petitioner Delli Paoli later that day should have further underscored the obligation confronting the court to have conducted an evidentiary hearing into the question of the effective assistance of counsel. More specifically, counsel for Delli Paoli saw fit to offer into evidence an address book which had been seized from Delli Paoli at the time of his arrest which contained certain information which

*Mr. Delli Paoli's affidavit detailing this incident will be made available to this court upon request.

later proved helpful to the prosecution. At the time that the book was first offered into evidence, the prosecutor objected to its admission, but after counsel for the other defendants vehemently objected to its introduction on the grounds that it would serve to prejudice their clients, Mr. Delli Paoli's attorney withdrew the offer of the telephone book and the prosecutor, who had been alerted to the helpful nature of the information to the government's case, indicated that he would offer it himself upon the government's case (680a-686a), which, of course, he did.

Moreover, on January 12, 1979, the District Court judge granted an application made by Laurence Jeffrey Weingard, Delli Paoli's appellate counsel, for post-verdict discovery of a sealed affidavit submitted by petitioner's trial counsel as Court Exhibit 4 on July 31, 1978 (19sa).*

It is our view that the statements contained in trial counsel's affidavit, dated July 31, 1978, which perpetuated the divulgence to the prosecutor and court of a confidential communication made by Delli Paoli to his lawyer, are of considerable relevance in connection with the occurrence which took place on August 2, 1978. As indicated in the sealed affidavit, the confidential communication was made by Delli Paoli to his trial attorney on July 26, 1978, and the substance of the communication directly related to the trial then in progress. The affidavit further reveals that at the close of business on that date, trial counsel saw fit to divulge the confidential communication, *in camera,* to both the prosecutor and the trial judge.

In this regard, it is our purpose to point up to this court that the occurrence of July 26, 1978, which was later embodied

*The affidavit was submitted to the Second Circuit, under seal, as Exhibit B to motion papers dated January 1, 1979, seeking leave of the Court to file a supplemental brief. References prefixed by sa are to pages of a supplemental appendix filed with the Court of Appeals.

in the affidavit of July 31, 1978, was most assuredly quite fresh in the District Juge's mind when Delli Paoli sought the court's assistance on August 2, 1978 because of threats which had been made by trial counsel. While it is our view that the statements made by Delli Paoli on August 2, 1978, in and of themselves obligated the District Court judge to *sua sponte* initiate an inquiry as to whether the difficulties regarding the fee which had created a rift between attorney and client was precluding the effective assistance of counsel, the manifest need for such an evidentiary hearing was certainly further underscored by the events of July 26, 1978.

The affidavit submitted by trial counsel on July 31, 1978 is indicative of the fact that the breakdown in communications which clearly surfaced on August 2, 1978 had actually first become evident several days prior to August 2, 1978, and that the District Court judge had been made aware of some difficulties regarding the lawyer-client relationship as early as July 26, 1978.

The affidavit clearly indicates that on July 26, 1978, Delli Paoli's trial counsel divulged to the prosecutor and court the substance of a confidential communication made to him by his client during the midst of a criminal trial to which the confidential communication directly related. In so doing, trial counsel breached one of the most fundamental obligations owed by a lawyer to his client.

While this firm is sensitive to the need to further elaborate upon the manner in which the contents of the affidavit dated July 31, 1978 should have further underscored to the District Court judge that he had a responsibility to conduct an evidentiary hearing as to whether the difficulties being experienced by trial counsel in collecting his fee had created the type of rift which precluded effective assistance of counsel, we are likewise not unmindful of the fact that the confidential nature of the

statmeents contained in that affidavit precludes a more in-depth type of argumentation.

It is essential, however, that we request that this court bear in mind the significant facts that the District Court judge had participated in an *in camera* conference on July 26, 1978 at which time the confidential communication contained in the July 31, 1978 affidavit was first brought to his attention. Moreover, when the affidavit was actually submitted to him on July 31, 1978, the District Court judge was again alerted to the fact that Delli Paoli's trial attorney had seen fit to breach his duty to preserve the confidences conveyed to him by Delli Paoli. As a consequence, when on August 2, 1978, a few short days thereafer, Delli Paoli pointed out to the court that his lawyer had threatened him, the events of the preceding week relating to the facts asserted in the affidavit of July 31, 1978 which pertained to the confidential communication divulged on July 26, 1978, should have played a significant role in the judge's evaluation of the remarks made by Delli Paoli.

It is our view that based upon the court's knowledge that trial counsel had divulged the confidential communication during the *in camera* conference of July 26, 1978—to which divulgence he should have been acutely sensitive when Delli Paoli informed him on August 2, 1978 that he had been threatened by his lawyer—the court's relevant responsibilities as to whether an evidentiary inquiry should have been conducted, should have been dramatically influenced by what was then fresh in his mind regarding the situation contained in trial counsel's affidavit dated July 31, 1978.

In conclusion, it is submitted that on the basis of the arguments herein, in conjunction with the contents of the affidavit sealed on July 31, 1978 as Court Exhibit 4, the District Court judge committed reversible error in not taking it upon himself to conduct a *sua sponte* evidentiary inquiry on August 2, 1978 as to whether the threats brought to his attention at that

time by Delli Paoli had created a situation which made it impossible for his trial lawyer to provide effective assistance to petitioner.

POINT SIX

THE DISTRICT COURT WAS IN ERROR WHEN IT DECLINED TO GRANT PETITIONER'S POST-VERDICT DISCOVERY APPLICATION, SINCE THE ITEMS SOUGHT HAD BEEN RECEIVED, BY THE COURT IN CAMERA, DURING DEFENDANTS TRIAL AND THE INFORMATION CONTAINED IN THE MATERIALS IS RELEVANT TO A LEGITIMATE OBJECT OF THE DEFENDANTS' INQUIRY.

Prior to the commencement of trial, counsel for co-defendant Warme issued a subpoena for the personnel records of Detectives Caracappa and Petraglia, the Government's principal witnesses. After an extended colloquy on that subject (23a-36a), the court suggested that the Assistant United States Attorney should peruse the relevant material to see whether there was any "Brady or 3500 materials in there" (37a). While counsel objected to the procedure which would permit an advocate for the government to preliminarily peruse the materials in question (39a), it appears from the record that such procedure was employed upon the basis that the prosecutor was directed to transmit to the court anything that was even remotely relevant so that the court could thereupon conduct its own review (39a).

Thereafter, the court indicated that he had reviewed the relevant files and had found nothing resembling 3500 material therein (47a). However, the court indicated that there indeed was "Brady" material within one of the files which related to one of the police witnesses, which officer the court did not identify, and which concerned a period of time preceding his police

employment. The pertinent information, according to the court, appeared in his application to the Police Department (47a-48a). In that connection, the court viewed the so-called Brady material to be privileged and thus inadmissible on two unspecified separate grounds. In light of the foregoing, the government's motion to quash the subpoena was granted by the court (48a), and the materials referred to by the trial judge were extracted and sealed to make them a part of the record for purposes of appellate review (48a; see Court's Exhibit 2). This, of course, was over the objection of counsel for all defendants, which objections were based upon the grounds that suppression of the information would violate defendant's right to confront and cross-examine the witnesses against them.

Thereafter, prior to the opening statement of the prosecutor, a further application was made by counsel for Warme seeking additional 3500 material in the form of Detective Caracappa's reports, as well as his Grand Jury testimony pertaining to amphetamine conspiracy and distribution charges (Indictment No. 78 Cr. 263) then pending against Warme;* which charges arose out of transactions with Caracappa. In that regard, the court indicated that it would review the relevant portions of the Grand Jury transcript relating to the amphgetamine charges, as well as certain reports pertaining thereto (46.9a). Thereafter, the court indicated that he was not going to release certain portions of the Grand Jury transcript or the relevant reports pertaining to the amphetamine transactions and marked them as part of Court Exhibit 2 (49a-50a), which, as indicated, had been sealed (see also 12sa-14sa).

During the course of the ensuing trial, Detectives Caracappa and Petraglia testified extensively, and gave extremely damaging testimony against each of the defendants.

*This indictment was dismissed on the motion of the government following Warme's conviction herein.

Following the jury's verdict and defenants' sentencing, counsel for Warme and Delli Paoli, by notice of motion returnable January 12, 1979 moved, pursuant to Rule 33 of the Federal Rules of Criminal Procedure for post-verdict discovery of a variety of items which were submitted to the trial court, *in camera* (30sa *et seq.*).

Following oral argument, the District Court denied the petitioner's requests for access to the so-called "Brady" material contained in the police personnel files and further refused access to Caracappa's Grand Jury testimony and his reports relating to the amphetamine charges; this, despite the fact that the court was apprised of the dismissal of Warme's related indictment (78 Cr. 263) (23sa-29sa).

From a purely procedural standpoint, it seems well settled that a defendant contemplating an application pursuant to Rule 33 for a new trial has the right to apply to the trial court for a discovery order seeking disclosure of materials which relate to *in camera* proceedings which occurred during the course of his criminal trial; this, despite any express authority contained in Rule 33 for such disclosure [see, *United States v. Moten,* 582 F.2d 654, 660 (2d Cir. 1978)]; *Moore's Federal Practice,* paragraph 33.03[[3]].

In a recent holding granting post-verdict disclosure pursuant to Rule 33 of the Federal Rules of Criminal Procedure of a variety of *in camera* materials which related to incidents which occurred during the course of the defendants' trial, the Second Circuit had occasion to reaffirm its prior holdings indicating that there is a presumption against the use of *in camera* proceedings and that they may only be permitted and justified by compelling state interests [*Ibid.* at 661; *In Re Grand Jury Subpoena Directing Taylor to Appear and Testify,* 567 F.2d 1183, 1188 (2d Cir. 1977)]. The court went on to note in *Moten* that every defendant has a valid interest in knowing precisely what

occurred during the course of his trial and indicated further that "[t]he interests of a defendant in obtaining disclosure is adequately established when it appears that (1) the *in camera* proceedings occurred during his trial and (2) the inforamtion contained in the materials is relevant to a legitimate object of his inquiry." [*United States v. Moten, supra* at 661]. In other words, all a defendant need do is demonstrate that *in camera* proceedings occurred during his trial and that the information contained therein is relevant to some legitimate object of his inquiry and he is entitled to disclosure unless the government sustains it burden of proving sufficiently compelling state interests requiring continued secrecy [*Ibid.* at 660-662]. Additionally, "[i]f the materials are relevant, the District Judge's estimation of their lack of helpfulness does not justify withholding them from the defense." [*Id.* at 662]. Applying the *Moten* standards to the District Court's denial of post-verdict discovery, it is plain to see that the petitioner had met his preliminary obligation of demonstrating that the *in camera* incidents (the personnel files subpoenaed relating to the undercover agents and the Grand Jury testimony and reports of Detective Caracappa bearing upon his dealings with Warme) occurred during the petitioner's trial and, the information contained in the materials were relevant to a legitimate object of the petitioner's inquiries (potentially crucial impeachment material relating to the undercover agents upon whose testimony the government's case rested).

With respect to Detctive Caracappa's Grand Jury testimony bearing upon the closely related and now dismissed amphetamine charges, we recognize that the *Moten* court analyzed those cases suggesting that in that circuit the burden is on the party seeking disclosure to show a "particularized need" that outweighs the need for secrecy generally attaching to Grand Jury proceedings and concluded that there was no need in *Moten* to reexamine that particular doctrine [*Id.* at 662]. It should be pointed out that the petitioner herein was indeed able to demonstrate a "particularized need" which outweighed the

need for continued Grand Jury secrecy. In that regard, and as pointed out in the affidavit of Jeffrey Weingard which was annexed to the Notice of Motion seeking post-verdict discovery below, it is significant to recall that the jury in this case refused to credit a substantial portion of the testimony of the undercover agents as that testimony related to various incidents bearing upon the defendants' claim of coercion. Each of the defendants was acquitted of all charges which related to that defense. It must be noted, therefore, that this case was indeed a truly close one with respect to the question of the credibility of the government's main witnesses. Had the additional material sought by the defense at trial been made available at that time, it might well have proved significant in cross-examination and, to that end, could well have shifted the balance on the issue of credibility in favor of the petitioner who presently stands convicted upon the testimony of these detectives.

Additionally, *Moten* appears to have been concerned with whether the Grand Jury investigation which was central to the theme of that case remained active [*Id.* at 662]. By analogy, it should have been of significance to the District Court that the criminal proceeding to which the Grand Jury testimony withheld from the defense related [78 Cr. 263] has been dismissed by the government. Under the circumstances, no valid reason can possibly be claimed for continued suppression of the relevant portions of the Grand Jury testimony which was requested below.

Moreover, and quite apart from the petitioner's post-verdict discovery claims discussed above, it is clear that the trial court improperly concluded that the detectives' personnel files should not have been released to the defense at trial. To begin with, and as noted above, the court itself concluded that the files contained some "impeachment matter" which was "derogatory" to one of the officers and which "could be considered Brady material". Nevertheless, he refused to permit defense counsel access to it on the grounds that it was both

privileged and inappropriate for use on cross-examination. In this regard, the District Court was clearly in error.

An accused's constitutional right to confront and cross-examine the witnesses against him is at the foundation of our system of justice [See *Smith v. Illinois,* 390 U.S. 129, 132 (1968)]. Even assuming that the information in the file was privileged, the privileged status of evidence cannot justify its suppression where to do so results in an interference with the accused's right of confrontation [*Davis v. Alaska,* 415 U.S. 308 (1974); Cf. *Chambers v. Mississippi,* 410 U.S. 384 (1973). (Rule of evidence precluding cross-examination by accused of his own witness held to violate confrontation clause)]. The claimed privilege, therefore, was an erroneous bases for the lower court's ruling. As for the District Judge's finding that the information was inappropriate for use on cross-examination, the concealment of the information precluded counsel from making any presentation as to the propriety of the ruling and resulted in the denial of petitioner's right to the effective assistance of counsel [see *United States v. Taylor,* 562 F.2d 1345, 1365-1366 (2d Cir. 1977), *cert. denied* 432 U.S. 909 (1978); *United States v. Van Meerbeke,* 548 F.2d 415, 418 (2d Cir. 1976), *cert. denied* 430 U.S. 974 (1977); *United States v. Robinson,* 544 F.2d 611, 620-621 (2d Cir. 1976), reh. *en banc,* 560 F. 2d 507, 516 (2d Cir. 1977), *cert. denied* 435 U.S. 905 (1978); see also *Dennis v. United States,* 384 U.S. 855, 874 (1966)].

In *Davis v. Alaska, supra,* the defense was denied the use of damaging impeachment material in its cross-examination of a crucial prosecution witness. In holding that an accused's right to the effective cross-examination of the witnesses against him superseded countervailing interests of privilege, the *Davis* Court stated, at 356:

> "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding

of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records."

The situation in *Davis* was analogous to the one presented here. In both cases a claim of privilege with respect to impeachment material resulted in its suppression by the trial court. In both cases suppression resulted in an interference with an accused's right of confrontation. The holding in *Davis* compels the conclusion that the District Judge here was clearly in error when he withheld the information in the personnel file on the ground that it was privileged.

A second ground asserted by the lower court for withholding the information in the file from counsel was that it was inappropriate for use on cross-examination. Never advised as to the content of the information, defense counsel were rendered impotent to offer any argument on the subject or contest in any way the legal propriety of the District Judge's ruling. Petitoner was thus placed in the intolerable position of having counsel who had been relegated by the court to the role of vestigial functionary. Petitioner was, as a result, denied his constitutional right to the effective assistance of counsel.

In a series of recent cases, federal courts have repeatedly recognized that trial counsel in our system are intended to serve an important role, and that that role is not fulfilled when they are rendered mere ornamentation or window dressing. In *United States v. Taylor, supra, United States v. VanMeerbeke, supra,* and in *United States v. Robinson, supra,* this Court was confronted with situations in which trial judges refused or failed

to make known to counsel facts or circumstances that could have effected the course of a defendant's trial. *Taylor* is typical of the cases cited. There, the trial judge did not reveal to counsel a communication it had received from a juror in which the juror sought to withdraw from deliberations to make funeral arrangements for a family member. Addressing itself to the propriety of the trial judge's failure to inform counsel of the communication, the Court stated, at 1366:

"Before deciding to deny the juror's request to be excused from the trial, the court should have had 'an informed discussion [with counsel] on the proper course to follow' *United States v. Van Meerbeke,* 548 F.2d 415, 418, (2d Cir. 1976). The fact that the court might then have similarly denied the request, we recently stated in a related context, 'is irrelevant to the right of the appellant[s] to be informed . . . and also ignores the benefits which informed discussion and debate between court and counsel may produce even where a court may be aware in the abstract of its own alternatives.' *United States v. Robinson,* 544 F.2d 611, 621 (2d Cir. 1976), *rehearing en banc granted,* No. 76-1153 (Feb. 17, 1977)."

Based upon the cases cited, there can be little question but that the District Judge here committed error by refusing to at least reveal the content of the file so that counsel could have intelligently addressed themselves to the question of whether it was appropriate for use on cross-examination. The trial court erroneously usurped counsel's function, and what was said in *Dennis, supra,* in a related context, is equally applicable here: "In our adversary system, it is enough for judge's to judge." [*Dennis v. United States, supra,* at 874]. To the extent that revelation to defense counsel might have caused the Detective embarrassment or the like, "A slight degree of potential embarrassment faced by a [witness] is of little moment when compared to the potential loss of liberty faced by a defendant." [*United States v. Taylor, supra,* at 1366].

CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT AND OPINION OF THE SECOND CIRCUIT.

Respectfully submitted,

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APPENDIX "A"
DECISION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 647-9—August Term, 1978.

(Argued March 20, 1979 Decided June 26, 1979.)

Docket No. 78-1395-7

UNITED STATES OF AMERICA,

Appellee,

—against—

ORLANDO DELLI PAOLI, RICHARD WARME, and VICTOR ISAZA,

Appellants.

Before:

LUMBARD and OAKES, *Circuit Judges,* and
BRIEANT, *District Judge.**

Appellants appeal from judgments of conviction for distribution of cocaine and conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846, in the Southern District of New York, Goettel, J., on the grounds that the government failed to prove the existence of a single conspiracy and that the district court made erroneous evidentiary rulings.

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* Of the Southern District of New York, sitting by designation.

Affirmed.

ROY BROUDNY, Esq., and LAURENCE JEFFREY WEINGARD, Esq., New York, N.Y. (Weingard & Broudny, New York, N.Y.), *for appellants Orlando Delli Paoli and Richard Warme.*

STUART HOLTZMAN, Esq., New York, N.Y., *for appellant Victor Isaza.*

THOMAS H. SEAR, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, of counsel), *for appellee.*

LUMBARD, *Circuit Judge:*

Orlando Delli Paoli, Richard Warme, and Victor Isaza appeal from judgments of conviction entered September 27, 1978, October 6, 1978, and October 12, 1978, respectively, after a three-week jury trial before Judge Gerard L. Goettel in the Southern District of New York on an indictment charging distribution of cocaine and conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846. On appeal, appellants contend that the government's proof at trial established multiple conspiracies, and that each appellant was seriously prejudiced by the proof of other conspiracies in which he was not involved. Appellants also contend that the district court made several erroneous evidentiary rulings. Finding appellants' claims to be without merit, we affirm.

The central question on appeal is whether the jury could find that the evidence supported the charge of a single conspiracy. From an examination of the record, we conclude

that the evidence showed that over a period of several weeks in early 1978, the defendants were acting together and knew they were acting together to distribute heroin and cocaine. The mastermind was Richard Warme, who sought to obtain for resale a steady supply of heroin and cocaine from a number of suppliers. Warme obtained quantities of cocaine from a partnership composed of defendants Isaza and Wayne Petrucha for resale to New York narcotics agents.[1] The proof also showed that Warme advanced $20,000 to defendant Delli Paoli for ½ pound of heroin, $20,000 which later disappeared into the pocket of a trusted confederate who absconded to parts unknown without delivering the heroin. Most of the important activity took place at three places in the Bronx: at Warme's residence, at a furniture store owned by Warme's mother-in-law, and at the Andrea Motel which was owned by the family of Delli Paoli.

On January 24, 1978, Detective Steven Caracappa of the New York Drug Enforcement Task Force went to an apartment in the Bronx. There a woman named Lorraine introduced Caracappa to Warme. Warme offered to sell Caracappa two kilograms of cocaine. Caracappa agreed. The following day, Warme again met with Caracappa at the same apartment, provided him with a sample of cocaine, and promised to provide him with heroin.

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1 Warme also purchased narcotics from defendant Robert Bolella, who pled guilty prior to trial and who was sentenced to 312 days imprisonment and five years special parole. Defendant Petrucha also pled guilty prior to trial and was sentenced to one year and a day imprisonment and five years special parole.

After their convictions at trial, defendant Delli Paoli was sentenced to two years imprisonment and three years special parole, defendant Warme was sentenced to four seven-year concurrent sentences and ten years special parole, and defendant Isaza was sentenced to an indeterminate term of imprisonment to be followed by three years special parole. Diane Warme, wife of defendant Richard Warme, was also charged with conspiracy but was acquitted after trial.

Warme was not able to deliver any drugs at that time. Caracappa, however, maintained contact with Warme who repeatedly promised that he would shortly have both heroin and cocaine. Thus on February 2, 1978, Warme explained in one of many tape-recorded conversations that he had not been able to supply the promised narcotics because a confederate had not done the "right thing on the other end." When Caracappa replied that he did not want to pressure Warme, Warme indicated that he wanted to go through with the deal but that he would have to "go there myself." Later, on February 14, 1978, when Warme indicated that there were still supply problems, Caracappa replied, "If there's a problem, you know I rather like back away from the thing. . . . if you don't want to do it, I don't want to push it." In later conversations, Warme continued to urge Caracappa to be patient because he expected to solve his supply problems shortly.

Finally, on the evening of February 21, 1978, Warme took Caracappa to the Twilight Longue in the Bronx. There Warme introduced Caracappa to defendant Robert Bolella, whom Warme said was the man responsible for "hanging him up" on the deal. Although Bolella had already committed his heroin to someone else, he agreed to sell four ounces of cocaine to Caracappa.

On February 25, Warme, Bolella, and Caracappa met at Warme's house. Caracappa then drove Bolella to the home of Bolella's "connection" in Scarsdale to pick up one ounce of cocaine for $1,000. When Caracappa returned to Warme's house with Bolella, Caracappa paid Bolella for his help an additional $200, $100 of which Bolella paid to Warme.

On March 2, 1978, Delli Paoli met Warme at a furniture store belonging to Warme's mother-in-law, located at 3434 Tremont Avenue in the Bronx. After Delli Paoli left,

Caracappa arrived. Thereafter, defendant Wayne Petrucha arrived with a sample of cocaine, which he gave to Warme and which Warme then gave to Caracappa. After receiving the sample, Caracappa agreed to purchase through Warme three or four ounces of cocaine at $1,400 per ounce later that night. Caracappa gave Warme $1,200 "front" money toward the purchase price and Warme turned the money over to Petrucha. That afternoon, defendant Bolella also visited the furniture store where he and Warme discussed with Caracappa a sale of heroin and additional amounts of cocaine. That evening, Caracappa, Warme, and Petrucha met again at the furniture store. Petrucha sold to Caracappa five ounces of cocaine for a total price of $7,000. Caracappa paid Warme $50 for his help.

On the evening of March 9, 1978, Caracappa, accompanied by undercover officer William Petraglia, drove with Warme to Warme's apartment at 1101 Throgs Neck Boulevard in the Bronx. Shortly after their arrival, defendant Wayne Petrucha came to the apartment, accompanied by defendant Victor Isaza. Petrucha told Caracappa that Isaza was "the connection." Caracappa then purchased from Petrucha and Isaza five more ounces of cocaine, this time at $1,200 per ounce. Isaza said that this cocaine was the same material Caracappa had purchased March 2, and that he and Petrucha could obtain for Caracappa large quantities of both heroin and cocaine. After Petrucha and Isaza left, Caracappa paid Warme $400 for his "cut on the deal."

On March 14, 1978, Warme, Caracappa, and Petraglia met again at the Crosstown Diner in the Bronx. There Warme told Caracappa and Petraglia that he had a heroin connection (Delli Paoli) who was associated with "Fat" Tony Salerno and the "Pleasant Avenue People", and that he would soon be able to provide seven ounces of white heroin for $11,000.

On March 16, 1978, Warme met Caracappa and Petraglia at the furniture store to discuss further the proposed heroin deal. His connection, he said, had just completed a $50,000 heroin deal. Later that night, Warme met with Caracappa and Petraglia at Damien's Bar in the Bronx. Delli Paoli arrived for a brief visit, during which time he looked at but did not speak with Caracappa. After Delli Paoli left, Warme informed the officers that the heroin deal had fallen through. Warme then assured them that he would have heroin available on Sunday, March 19, 1978.

On March 19, 1978, Caracappa and Petraglia travelled to the furniture store owned by Warme's mother-in-law. The officers gave Warme $11,000 front money for the seven ounces of heroin which he promised would arrive that evening. Warme then drove to the Andrea Motel in the Bronx, which was owned by Delli Paoli's family. After meeting with Delli Paoli, Warme returned to the officers and reported that the heroin had not yet arrived. He told them to meet him at the Colonial Inn in the Bronx. Bolella later picked up the officers at the Colonial Inn and brought them to Caesar's Restaurant in the Bronx, where he received a call from Warme reporting that the heroin had still not arrived.

Warme met with the undercover officers during the early morning hours of March 21, 1978 at his apartment. Warme returned $9,000 to the officers and explained that he had left $2,000 with his connection as a binder on the heroin which had still not arrived. Later that day, Warme asked for $9,000 back so that he could pay for the heroin, which he expected momentarily. Caracappa refused, telling Warme that he would have to receive something for his $2,000 before he advanced any more money.

On March 23, 1978, Warme again met with the undercover officers at the furniture store. After Warme explained

his connection's pricing policies, Caracappa and Petraglia agreed to pay $20,000 "up front" and $15,000 after delivery for a ½ pound of heroin, which Warme expected to receive over the weekend. Warme then left to see his "man"—Delli Paoli.

On the morning of March 27, 1978, Warme called Caracappa and told him that the heroin had arrived. Petraglia put the $20,000 package of money together while Caracappa drove to the furniture store. Later that day, Warme took the two undercover officers to a restaurant near the Andrea Motel. Warme then drove over to the Andrea Motel with the $20,000. After he arrived at the motel, he was observed conferring with Delli Paoli. Later in the afternoon, Warme once again assured the officers that the heroin would arrive momentarily. He then drove back to the motel for further discussions with Delli Paoli. After a further delay, Warme's wife Diane Warme finally responded to the officers' impatience by escorting Caracappa and Petraglia to a room at the motel where the officers met Delli Paoli for the first time. Delli Paoli explained to the officers that there was "a little problem." According to Delli Paoli, he had given the $20,000 to an old friend of his, Sam Schifano, whom he had known for 25 years. Schifano had taken the $20,000 to buy the heroin and had disappeared. Delli Paoli said that he had told Warme to search for Schifano. He then told the officers to meet him at Warme's house in an hour.

The undercover officers met with Delli Paoli at Warme's house during the early morning hours of March 28, 1978. Delli Paoli informed the officers that it looked like the money was gone for good. Delli Paoli then indicated that he would pay the money back with interest either with cash payments or with payments of drugs.

The officers met with Warme at his apartment on the afternoon of March 28. Warme said that he had been up all night looking for Schifano and that he would try to make up the loss with eight ounces of cocaine. Delli Paoli then arrived and said that he had other people looking for Schifano as well. He confirmed Warme's promises that they would pay the officers back with drugs.

On March 29, Caracappa and Warme discussed Warme's efforts to get what cocaine he could to make up the $20,000. Warme was relying heavily upon Petrucha. That night, Warme met Caracappa and Petraglia outside Warme's residence, told them to wait, and went to the furniture store where Petrucha was waiting with a package of cocaine. Warme took the cocaine from Petrucha and stepped into the back of the store, purportedly to get the money to pay Petrucha. In fact, Warme never had any intention of paying Petrucha. He continued out the back door and jumped over a fence. Bolella picked him up in his car and they drove past the undercover officers, signaling for them to follow. Bolella and Warme stopped near the Bartow exit on the New England Thruway and there gave the officers five ounces of cocaine. Later than night, Caracappa called Delli Paoli to tell him that the five ounces of cocaine only partially compensated him for the lost $20,000. Delli Paoli replied that he would try to make up the difference with heroin.

On March 30, Caracappa spoke several times with Warme and Petrucha. In one conversation, Petrucha specifically identified Isaza as a major participant in his cocaine dealing. That night, the undercover officers met with Warme at the Andrea Motel. Warme emphasized that Delli Paoli was at least as responsible as he was for the $20,000 loss, since Schifano was his friend and had put his "blessing" on the deal. Warme also gave the officers another

ounce of heavily cut cocaine. Later, Warme gave them an additional four ounces of this low-quality cocaine. Although Warme said that he received this cocaine from a new source, the available evidence strongly suggests that he merely took the five ounces of cocaine stolen from Petrucha and added enough quinine to make it into ten ounces.

The following day, March 31, Warme and Delli Paoli were again observed and photographed together outside the Andrea Motel just before their arrest brought the conspiracy to a close.

THE DEFENSE

The only defendants who testified were Diane Warme and Delli Paoli. Delli Paoli testified that he had known Warme since 1976, and that Warme had come to him on March 27 because he needed Delli Paoli's help. Warme told Delli Paoli that he "was in some kind of a problem, serious trouble." Delli Paoli said that Warme refused to tell him what the problem was. Delli Paoli further testified that he spoke to the undercover officers later that night on Warme's behalf. Delli Paoli testified that he did not know what the officers were talking about when they mentioned the drug deal, and that his conversations with Warme outside the Andrea Motel concerned construction problems and not narcotics.

A SINGLE CONSPIRACY

Defendants claim that the government's proof at trial established multiple conspiracies, and that each defendant was seriously prejudiced by the proof of other conspiracies in which he was not involved. Defendant Isaza also argues that his single sale of cocaine on March 9, 1978 was insufficient to support a conspiracy conviction.

The government charged a conspiracy to distribute narcotics beginning in January, 1978, and continuing until the

time when the various defendants were arrested. From the proof at trial, the jury could have found the existence of an ongoing narcotics business run by Richard Warme, who was the core participant and who brokered sales of cocaine by defendants Delli Paoli, Isaza and Petrucha. Each of the defendants knew of Warme's general plan and of the role each played in the attempt to bring that plan to fruition. We believe that there was suffficient evidence to permit the jury to find the single conspiracy charged in the indictment.

The proof at trial showed that these defendants became acquainted with Warme's plan and his strategy for carrying it out by March 2, 1978, at the latest. On that day, Delli Paoli, Warme's vaunted "connection", visited Warme at the furniture store belonging to Warme's mother-in-law. The jury could infer that Delli Paoli did not travel to the furniture store on any legitimate business, but that he visited Warme to discuss their narcotics dealings.

Soon after Delli Paoli left the furniture store, Caracappa and then Petrucha arrived. That night, Petrucha returned to the furniture store and delivered to Caracappa five ounces of cocaine for $5,000. On March 9, 1978, Petrucha identified Isaza to Caracappa as his "connection." Instead of objecting, Isaza confirmed his relationship with Petrucha and his covert involvement in the March 2 deal by telling Caracappa that the cocaine delivered on March 9 was the same material as the March 2 cocaine, and that he and Petrucha could obtain plenty more. Accordingly, the jury could infer that Isaza and Petrucha worked together, that Isaza participated in the March 2 transaction, and that both Petrucha and Isaza were members of the conspiracy as of that time.

Having become integral parts of Warme's supply network as early as March 2, defendants Delli Paoli, Petrucha, and Isaza inevitably came to know that they were not the only

suppliers. When Warme discussed with them his plan to sell large amounts of narcotics to the undercover officers, the other defendants must have known that he would obtain narcotics wherever he could. Thus Delli Paoli, Petrucha, and Isaza knew that whenever they could not meet Warme's needs, he would try to fill them elsewhere. In addition, when Warme and Delli Paoli planned partially to compensate Caracappa by stealing cocaine from Petrucha, Delli Paoli planned to smooth things over by talking to Petrucha's father. Thus the jury could infer that Delli Paoli knew Petrucha and probably Isaza as well. Where co-conspirators know with certainty that other suppliers and dealers exist, even if they are not known personally, this court has recognized the existence of a single conspiracy. *See, e.g., United States v. Moten,* 564 F.2d 620 (2d Cir. 1977) (narcotics conspiracy involving numerous defendants in Florida, New York, Washington, D.C., and Illinois); *United States v. Taylor,* 562 F.2d 1345 (2d Cir.), *cert. denied,* 432 U.S. 902 (1977) (narcotics conspiracy involving numerous defendants in New York and Washington, D.C.).

The cases appellants rely upon are distinguishable. In *United States v. Miley,* 513 F.2d 1191 (2d Cir.), *cert. denied,* 423 U.S. 842 (1975), a former drug dealer cooperating with the government in the hopes of receiving some clemency led the agents on drug buying trips which involved several sellers. None of the sellers had any reason to be aware of the other sellers. In *United States v. Bertolotti,* 529 F.2d 149 (2d Cir. 1975), a core group of narcotics traffickers engaged in four separate drug transactions whereby they either stole drugs without paying for them, or failed to deliver drugs for which they had received payment in cash. In each transaction they employed confederates hired for that transaction alone, confederates who had no reason to know that the core group had engaged in similar

thefts elsewhere. Finally, in *Kotteakos v. United States*, 328 U.S. 750 (1946), only one of the alleged conspirators, the core or "hub" conspirator, had any knowledge of the existence and identity of other "spoke" conspirators, or had reason to know of their existence and identity.

THE $50,000 HEROIN DEAL

Warme and Delli Paoli claim as error admission of Warme's statement to Caracappa and Petraglia that his "connection", Delli Paoli, "was very, very careful because he had just completed a $50,000 heroin deal in Miami, Florida." Both Delli Paoli and Warme contend that this testimony was inadmissible as mere "other crimes" evidence. Delli Paoli further argues that as to him this statement was an inadmissible hearsay declaration by Warme. We find that this statement was made in furtherance of the conspiracy and was direct evidence of the existence of the conspiracy. The statement was therefore admissible against all the co-conspirators, including Delli Paoli.

In admitting this testimony, the district court observed that no heroin had actually passed during the course of the conspiracy and that the government was therefore obligated to prove that "these were earnest negotiations by people who had the capability of delivering the heroin". Warme's statement that his connection had just completed a $50,000 heroin deal was admissible not only to prove capability and intent, but also as a classic statement in furtherance of the conspiracy. Warme intended by this statement to convince the officers that he had a good connection and meant business, even though the officers were not permitted to meet that connection.

We do not believe that the statement was inadmissible hearsay as to Delli Paoli. First, the statement was sufficiently reliable, for it was a statement in furtherance of the

conspiracy and against penal interest when made. *See United States v. Puco*, 476, F.2d 1099, 1107 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973). Second, there was sufficient independent non-hearsay evidence that Delli Paoli was a member of the conspiracy, as our recitation of the facts amply shows.

"FAT" TONY SALERNO AND THE PLEASANT AVENUE PEOPLE

Warme and Delli Paoli claim reversible error in the admission of Caracappa's testimony that Warme told him on March 9 that Delli Paoli was "hooked up with 'Fat' Tony Salerno and the Pleasant Avenue People." Appellants argue that this testimony unnecessarily injected into the trial the spectre of organized crime. We disagree.

Caracappa's passing reference to " 'Fat' Tony Salerno and the 'Pleasant Avenue people,' " standing alone, was not sufficiently prejudicial to require a mistrial. Appellants' claim that the jury necessarily inferred from this testimony that the defendants were involved in organized crime certainly overstates any impact this testimony might have had. Even assuming that appellants may know that "Fat" Tony Salerno was associated with organized crime, mention of Salerno's nickname, by itself, could not convey the same meaning to the jury. For all the jury knew, "Fat" Tony could have been a blues singer, a jazz musician, a pool player, or a wrestler. The district court, furthermore, gave a cautionary instruction and the government did not pursue this matter any further.

DESTRUCTION OF ROUGH DRAFTS AND NOTES

Warme and Delli Paoli claim that the district court should have stricken the testimony of government witnesses who had destroyed rough drafts and notes of written reports made during the course of the investigation. The

handwritten notes at issue were made by agents Caracappa and John Mullen, the surveillance agent who observed many of the defendants' meetings. Caracappa testified that he had made numerous handwritten reports during the course of the investigation and that, in accordance with the normal procedure followed at that time, he had discarded his handwritten notes and drafts after he had checked typewritten copies for accuracy. Similarly, officer Mullen had discarded his handwritten notes after he had put all the information they contained into typewritten final reports. Caracappa's and Mullen's final typewritten reports were disclosed to defense counsel as § 3500 material.

In suggesting that the failure to preserve handwritten notes should require a new trial, appellants rely on our decision in *United States v. Bufalino,* 576 F.2d 446 (2d Cir. 1978). In *Bufalino,* defendants contended that certain tape recordings should have been suppressed because an agent had destroyed a duplicate tape which might have shed some light on numerous gaps and inaudible passages in the tape recordings admitted at trial. Both we and Judge Lasker sharply criticized the FBI practice of destroying such material. Because the evidence of guilt was substantial, however, we affirmed the convictions. We nevertheless stated that we would look "with an exceedingly jaundiced eye upon future efforts to justify non-production of a Rule 16 or Jencks Act 'statement' by reference to 'department policy' or 'established practice' or anything of the like. . . . Where, as here, destruction is deliberate, sanctions will normally follow . . . unless the Government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant." 576 F.2d at 449. We do not, however, believe that *Bufalino* requires a new trial or dismissal of the indictment here. *Bufalino* was filed on May 10, 1978, after the investigation in this case was completed and all rough

drafts and notes destroyed. No useful deterrent purpose would be served by penalizing the government for having followed a policy which we understand has since been abandoned.

ENTRAPMENT

Warme contends that the district court's refusal to give an entrapment charge as requested was reversible error. To be entitled to an entrapment charge, the defendant must produce some credible evidence tending to show that government agents induced him to commit the crime. *United States v. Henry,* 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied,* 397 U.S. 953 (1970). Although Warme had sufficient opportunity to introduce such evidence if he had it, he made no attempt to introduce evidence of inducement. As a result, there was no evidence from which the jury could infer inducement or entrapment. The district court was clearly correct in refusing to give any entrapment charge.

LORRAINE

Warme argues that the district court should have ordered the government to disclose whether the woman named Lorraine, who introduced Caracappa to Warme, was a government informant. Lorraine was not called as a witness. Warme's counsel wanted to know more about Lorraine's precise relationship with the government in the hope that such information might help an entrapment defense. The district court indicated when counsel first demanded disclosure of Lorraine's status that it would not order disclosure until counsel brought forth some evidence tending to support an entrapment defense. Counsel never introduced any evidence tending to support an entrapment defense. As Lorraine's relationship with the government was therefore irrelevant to the issues presented by the defendant at trial, the district court properly refused to

order the requested disclosure. *See United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976); *United States v. Soles*, 482 F.2d 105 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973). *Cf. Roviaro v. United States*, 353 U.S. 53 (1957).

THE MARCH 30 CONVERSATION

Defendant Isaza argues that the district court erred when it admitted into evidence portions of a March 30, 1978 tape-recorded telephone conversation between defendant Wayne Petrucha and undercover officer Caracappa. This conversation tended to show that Isaza had acted with Petrucha in selling cocaine to Caracappa.

The March 30 conversation occurred after Warme had taken from Petrucha several ounces of cocaine without paying for it. During the first part of the conversation, Diane Warme told Caracappa that the "spics" had sent a "message" that "me and Wayne are 'dead' if this thing ain't straightened out by tomorrow evening." Petrucha then told Caracappa that Isaza was connected to the source for the cocaine that Warme had taken, that Isaza was the person who had done business before with Caracappa, and that Isaza's friends had threatened to get Petrucha if he did not pay for the cocaine that had been stolen. The government introduced this conversation as one made in furtherance of the conspiracy.

Although this conversation clearly had probative value, Isaza contends that any probative value was substantially outweighed by its prejudicial impact. The district court balanced the probative value and the prejudicial impact and concluded that the evidence was admissible. We find no abuse of discretion in that conclusion. *Cf. United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975) (death threat evidence).

The appellants' remaining contentions do not merit discussion.

Affirmed.

APPENDIX "B"
JUDGMENT AND PROBATION/ COMMITMENT ORDER

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

ORLANDO DELLI PAOLI a/k/a Bobby London

Docket No. 78 Cr. 00264(1) GLG

In the presence of the attorney for the government, Thomas Sear, AUSA the defendant appeared in person on this date: October 12, 1978.

With Counsel: Daniel Greenberg, Esq.

FINDING & JUDGMENT

There being a verdict of guilty on Count 1. Defendant has been convicted as charged of the offense(s) of a Schedule II narcotic Drug Controlled substance. (Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code. (Title 21, United States Code, Section 846).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on Count 1. Pursuant to the provisions of Section 841 of Title 21,

United States Code, the defendant is placed on SPECIAL PAROLE for a term of TEN (10) YEARS on Count 1, to commence upon expiration of confinement.

SPECIAL CONDITIONS OF PROBATION

Bail Pending Appeal.

s/Gerard L. Goettel
GERARD L. GOETTEL, U.S.D.J.

Date: 10/12/78

APPENDIX "C"
RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or re based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(Dec. 26, 1944 eff. Mar. 21, 1946).

APPENDIX "D"
FEDERAL RULES OF EVIDENCE, RULE 104

Preliminary Questions

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

APPENDIX "E"
Federal Rules of Evidence, Rule 403

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

APPENDIX "F"
U.S. CONSTITUTION, AMENDMENT 5

**Criminal actions—Provisions concerning—
Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "G"
U.S. CONSTITUTION, AMENDMENT 6

Rights of the Accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX "H"
21 U.S.C. §812

Schedules of controlled substances

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V . Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this title [Oct. 27, 1970] and shall be updated and republished on an annual basis thereafter.

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part [Oct. 27, 1970], and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) SCHEDULE II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a

currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) SCHEDULE III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) SCHEDULE IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) SCHEDULE V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 201 [21 USCS §811], consist of the

following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

[SCHEDULES OMITTED FROM APPENDIX]

APPENDIX "I"
TITLE 21, U.S.C. 841(a)(1) & (b)(1)(A)

OFFENSES AND PENALTIES

§841. Prohibited acts A-Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in section 405 [21 USCS §845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or

stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

Supreme Court, U. S.
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SEP 28 1979
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Nos. 79-118 and 79-5121

In the Supreme Court of the United States

OCTOBER TERM, 1978

ORLANDO DELLI PAOLI, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD WARME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	4
Conclusion	14

CITATIONS

Cases:

Chew v. *United States*, cert. denied, 430 U.S. 918	5
Cross v. *United States*, 392 F.2d 360	11
Harris v. *United States*, cert. denied, 434 U.S. 986	5
Mehta v. *United States*, cert. denied, 434 U.S. 965	5
Shovea v. *United States*, cert. denied, No. 78-780 (Feb. 21, 1979)	5
Stebbins v. *United States*, cert. denied, 434 U.S. 938	5
United States v. *Augenblick*, 393 U.S. 348	9
United States v. *Bufalino*, 576 F.2d 446, cert. denied, 439 U.S. 928	6, 7
United States v. *Carlson*, 547 F.2d 1346, cert. denied, 431 U.S. 914	12
United States v. *Harris*, 543 F.2d 1247	5, 7
United States v. *Harrison*, 524 F.2d 421	5, 6, 7
United States v. *Knuckles*, 581 F.2d 305, cert. denied, 439 U.S. 986	12

Cases—Continued Page

United States v. *Lane*, 574 F.2d 1019, cert. denied, 439 U.S. 867 6
United States v. *Martin*, 565 F.2d 362..... 5
United States v. *Mase*, 556 F.2d 671, cert. denied, 435 U.S. 916 5-6
United States v. *McCallie*, 554 F.2d 770.. 6
United States v. *Moten*, 564 F.2d 620, cert. denied, 434 U.S. 959 13
United States v. *Moten*, 582 F.2d 654..... 9, 10
United States v. *Ricco*, 549 F.2d 264, cert. denied, 431 U.S. 905 13
United States v. *Robinson*, 546 F.2d 309, cert. denied, 430 U.S. 918 7
United States v. *Vella*, 562 F.2d 275, cert. denied, 434 U.S. 1074 ..... 5, 7
United States v. *Warme*, 572 F.2d 57, cert. denied, 435 U.S. 1011 ..... 3, 9

Statutes and rules:

18 U.S.C. 3500(b) 9
18 U.S.C. 3500(c) 9
21 U.S.C. 812 3
21 U.S.C. 841(a)(1) 3
21 U.S.C. 841(b)(1)(A) 3
21 U.S.C. 846 3
Fed. R. Crim. P. 16 7
Fed. R. Evid.:
Rule 404(b) 12
Rule 801(d)(2)(E) 12

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-118

ORLANDO DELLI PAOLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79-5121

RICHARD WARME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1979. The petitions for a writ of certiorari were filed on July 25, 1979, in No. 79-118 and on July 24, 1979, in No. 79-5121. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to strike the testimony of two government agents because they had discarded their original investigative notes.

2. Whether the district court erred in failing to disclose the personnel files of two police officers who testified at trial and the grand jury testimony of one of those officers concerning unrelated drug charges then pending against petitioner Warme.

3. Whether the district court erred in failing to conduct a hearing *sua sponte* into the effectiveness of petitioner Delli Paoli's counsel (79-118 Pet. only).

4. Whether improper evidence of petitioner Delli Paoli's drug dealings and of his connection with alleged organized crime figures was admitted at trial.

5. Whether the district court erred in failing to order the government to disclose whether a person

[1] "Pet. App." refers to the appendix to the petition in No. 79-118.

who did not testify at trial was a government informant, and in failing to charge the jury on the defense of entrapment (79-5121 Pet. only).

6. Whether the proof at trial showed multiple conspiracies rather than the single conspiracy charged in the indictment (79-118 Pet. only).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to distribute cocaine and heroin, in violation of 21 U.S.C. 846. In addition, petitioner Warme was convicted on three substantive counts of distribution, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A).[2] Warme was sentenced to a total term of seven years' imprisonment to be followed by a ten-year special parole term.[3] Delli Paoli was sentenced to two years' imprisonment and a ten-year special parole term. The court of appeals affirmed (Pet. App. A).

The evidence adduced at trial is recounted in detail in the opinion of the court of appeals (Pet. App. 2a-9a). In sum, it showed that in early 1978 petitioners and their co-defendants conspired to sell

[2] The jury also convicted co-defendant Victor Isaza and acquitted co-defendant Diane Warme. Petitioners' other co-defendants, Wayne Petrucha and Robert Bolella, pleaded guilty prior to trial (Pet. App. 3a n.1).

[3] Warme's sentence was to run consecutively to a three-year term of imprisonment imposed following his conviction in an unrelated case. See *United States* v. *Warme*, 572 F.2d 57 (2d Cir.), cert. denied, 435 U.S. 1011 (1978)).

heroin and cocaine. During the first three months of 1978, petitioner Warme, the "mastermind" of the conspiracy (Pet. App. 3a), had a number of meetings and telephone conversations with undercover police officer Steven Caracappa relating to drug deals arranged by Warme. On February 25, 1978, Warme and a codefendant provided for Caracappa to purchase an ounce of cocaine. Thereafter, in March 1978, Caracappa purchased through Warme a total of ten ounces of cocaine for $13,000. Later that month, Warme also arranged for Caracappa and another undercover officer, William Petraglia, to buy one-half pound of heroin for $35,000 through petitioner Delli Paoli. On March 27, 1978, the officers gave petitioners $20,000 in "front" money; that afternoon, Delli Paoli claimed that "a friend" had absconded with the money. Petitioners promised, however, to pay the officers back with drugs, and Warme subsequently furnished them with substantial quantities of cocaine.

ARGUMENT

1. Petitioners contend (79-118 Pet. 41-48; 79-5121 Pet. 52-61) that the district court erred in refusing to strike the testimony of undercover officer Caracappa and Drug Enforcement Administration Agent John Mullen,[4] because the officers' original investigative notes had been destroyed in accordance with then-routine agency practice. Caracappa and Mullen discarded their original notes after the information they contained was incorporated into final typewritten reports, which were turned over to the defense at trial (Pet. App. 13a-14a).

This procedure did not violate petitioners' rights, nor did it require that the testimony of the government agents be stricken. This Court has declined to review similar claims in several previous cases,[5] and there is no reason for a different result here.[6]

We recognize that the courts of appeal have taken divergent views regarding the government's obligation to preserve and produce an agent's rough notes. Compare, *e.g.*, *United States* v. *Harris*, 543 F.2d 1247, 1249-1253 (9th Cir. 1976), and *United States* v. *Harrison*, 524 F.2d 421, 423-434 (D.C. Cir. 1975), with *United States* v. *Martin*, 565 F.2d 362, 363 (5th Cir. 1978), *United States* v. *Mase*, 556 F.2d 671, 676

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[4] Agent Mullen's principal involvement in this case was to take surveillance photographs that were admitted into evidence (Tr. 1501-1513). Petitioner Warme also observes in passing (79-5121 Pet. 55) that two other surveillance agents destroyed their rough notes. Our discussion focusing upon Caracappa and Mullen applies equally to the destruction of the notes of the other officers, whose testimony was less significant.

[5] See, *e.g.*, *Shovea* v. *United States*, cert. denied, No. 78-780 (Feb. 21, 1979); *Vella* v. *United States*, cert. denied, 434 U.S. 1074 (1978); *Stebbins* v. *United States*, cert. denied, 434 U.S. 938 (1977); *Harris* v. *United States*, cert. denied, 434 U.S. 986 (1977); *Mehta* v. *United States*, cert. denied, 434 U.S. 965 (1977); *Chew* v. *United States*, cert. denied, 430 U.S. 918 (1977).

[6] We note, moreover, that this issue is of little continuing significance since the government agencies most affected by the issue (including the FBI, the IRS, and the DEA) have recently revised their internal procedures to require the retention of the rough interview notes of their agents.

(2d Cir. 1977), cert. denied, 435 U.S. 916 (1978), and *United States* v. *McCallie*, 554 F.2d 770, 773 (6th Cir. 1977). However, those decisions that require preservation have considered the question only with respect to contemporaneous notes of an interrogation or other formal statement. The rationale for requiring preservation under those circumstances is that such notes are intended to reflect the declarations of the accused or of a witness. *United States* v. *Harrison*, *supra*, 524 F.2d at 427-428, 432. However, other types of rough investigative notes are not designed to record events of the investigation with the precision or detail appropriate to taking a witness' statements.

The materials at issue here were not interview notes. Caracappa's notes concerned his undercover investigative activities, including his conversations with petitioners that occurred during the course of the conspiracy. Mullen's notes concerned his surveillance duties in connection with the investigation (79-118 Pet. 43, 44). In these circumstances, the officers' notes were not of a nature that their retention was required in order to afford petitioners a fair trial. See *United States* v. *Lane*, 574 F.2d 1019, 1022 (10th Cir.), cert. denied, 439 U.S. 867 (1978).[7]

[7] *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir.), cert. denied, 439 U.S. 928 (1978), upon which petitioners rely (78-118 Pet. 41-42; 79-5121 Pet. 52-53), is not to the contrary. In *Bufalino*, agents destroyed actual "back-up" recordings of a defendant's conversations that were not identical to the recordings furnished to the defense and introduced at trial. 576 F.2d at 449. While the court of appeals affirmed the convictions, it criticized the practice of destroying possible "Rule 16 or Jencks Act" material, noting that the recordings in issue "might possibly have shed some light" on the gaps and inaudible passages contained in the recordings put into evidence. *Ibid.* But in that case, in contrast to the situation here, there was little question that the discarded recordings were discoverable under Fed. R. Crim. P. 16 since they contained statements of the defendant. In any event, as the court of appeals observed (Pet. App. 14a-15a), the destruction of the notes in this case preceded the decision in *Bufalino*.

Moreover, there is no reason to believe that the rough notes would have been of assistance to the defense. Petitioners' unsupported claim of prejudice is undermined by the agents' uncontradicted testimony that the information contained in their original notes was accurately reproduced in the final reports that petitioners did receive. In addition, petitioners' guilt was demonstrated by overwhelming evidence derived largely from electronic and photographic surveillance. Even those courts that require preservation of rough interview notes have refused to reverse where "no substantial rights of the [defendants] have been affected by the destruction of the rough notes." *United States* v. *Harris*, *supra*, 543 F.2d at 1253. See *United States* v. *Harrison*, *supra*, 524 F.2d at 435.[8]

[8] Petitioners do not cite, nor are we aware of, any case in which the good-faith destruction of rough notes in accordance with standard agency practice, as occurred here, has led to the reversal of a conviction. See, *e.g.*, *United States* v. *Vella*, 562 F.2d 275, 276 (3d Cir. 1977), cert. denied, 434 U.S. 1074 (1978); *United States* v. *Robinson*, 546 F.2d 309, 312 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977).

2. Petitioners contend (79-118 Pet. 60-67; 79-5121 Pet. 68-77) that the district court's failure to grant them access to possible impeachment material relating to undercover agents Caracappa and Petraglia denied them a fair trial.[9] This claim is without merit.

During trial, petitioner Warme subpoenaed the personnel files of officers Caracappa and Petraglia. After examining these documents *in camera*, the district court quashed the subpoena, stating that the records contained "nothing remotely resembling 3500 material" and "only * * * some possible impeachment matter * * * appear[ing] * * * in [an officer's] application to the Police Department," which, the court concluded, "is privileged on at least two grounds and is inadmissible on at least two grounds" (Tr. 84-85). Shortly thereafter, Warme sought the disclosure both of alleged "3500 material," including Caracappa's investigative reports, and of Caracappa's grand jury testimony concerning an unrelated indictment for amphetamine dealings then pending against Warme. The district court also inspected these documents *in camera* and thereafter refused to disclose the "five or six pages" of grand jury testimony because it was "restricted to the amphetamines and [included] no mention of cocaine whatever" (Tr. 86). The district court did, however, direct the government to treat all of Caracappa's reports as "3500 material," including those dealing solely with the amphetamine allegations, except for two earlier reports

[9] Delli Paoli did not raise this point in the court of appeals.

that, the court determined, would not have "any relevance" to Caracappa's trial testimony (Tr. 86-88). Following their conviction, petitioners' motion for a new trial and for disclosure of the withheld documents was denied (79-5121 Pet. 70).

In the circumstances of this case, the failure of the court to disclose the documents in issue did not deny petitioners a fair trial. The district court conducted a careful review of the requested documents as required by 18 U.S.C. 3500(c), and petitioners allege no facts tending to contradict the district court's finding that the only possible impeachment material contained in the undercover officers' personnel files relately solely to a "privileged and inadmissible" matter disclosed in an officer's employment application. Moreover, extensive Jencks Act material was furnished to petitioners for use in cross-examination of the undercover officers. With respect to the grand jury material, Caracappa did not testify at trial about Warme's amphetamine dealings and hence his grand jury testimony concerning those dealings was not required to be disclosed (see 18 U.S.C. 3500(b)); at the least, petitioners have not demonstrated that the district court abused its discretion in failing to disclose that material. See *United States* v. *Augenblick*, 393 U.S. 348, 355 (1969); *United States* v. *Warme*, *supra*, 572 F.2d at 62 n.6.[10]

[10] Petitioners rely on *United States* v. *Moten*, 582 F.2d 654 (2d Cir. 1978), to support their claim that they were at least entitled to post-trial discovery of the material that had been reviewed *in camera* by the district court. That case, however,

3. During trial Delli Paoli informed the court that a dispute over fees had developed with counsel, and that counsel did not want to represent him. Counsel, however, did not ask to be relieved (79-118 Pet. 54; Tr. 2054-2055). Petitioner Delli Paoli contends (79-118 Pet. 54-60) that the district court erred in failing *sua sponte* to conduct an evidentiary hearing into whether this alleged "rift" with trial counsel over the payment of legal fees denied him the effective assistance of counsel.

This incident provided no basis for an evidentiary hearing. Neither Delli Paoli nor his counsel requested the court to hold a hearing. Furthermore, Delli

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bears no resemblance to this one. During the trial in *Moten*, possible juror misconduct was brought to the attention of the court, which then conducted *in camera* examinations of the juror and another party who might have been involved in the misconduct. These persons subsequently testified before the grand jury in its investigation of the alleged juror misconduct. In these circumstances the court of appeals in *Moten* held that the defendant was entitled to disclosure of that grand jury testimony as well as the *in camera* proceedings on the grounds that *in camera* proceedings are disfavored in criminal trials, the government had not demonstrated any need for continued secrecy, and the information was "no doubt" relevant to the defendant's inquiry into whether juror misconduct had affected his right to an impartial jury. 582 F.2d at 660-664. Here, on the other hand, the district court's *in camera* scrutiny of the materials in issue is not even remotely analogous to the secret examination conducted in *Moten* and, as noted above, the non-disclosure of these materials could hardly have affected petitioners' right to a fair trial. Moreover, the Second Circuit itself was unpersuaded by petitioners' argument below that this case created an intra-circuit conflict with *Moten*, finding that their contention in this regard "do[es] not merit discussion" (Pet. App. 16a).

Paoli did not make any allegations to the district court that his attorney had not provided, or would not continue to provide, effective representation. Even now, Delli Paoli takes issue with but one decision by counsel over the course of a three-week trial.[11] With this single exception, Delli Paoli was evidently represented in a manner satisfactory to him, and we have found nothing in the record suggesting that counsel's representation was less than reasonably effective. Therefore, even if the trial court erred in not conducting a hearing into counsel's effectiveness, the error was harmless.[12]

4. Petitioners' remaining contentions were fully addressed and properly rejected by the court of appeals (Pet. App. 9a-16a), and we will discuss them only briefly.

a. Petitioners assert (79-118 Pet. 19-40; 79-5121 Pet. 38-51) that two statements were improperly admitted into evidence. First, they contend that the court erred in allowing testimony regarding an out-of-court statement by Warme implicating Delli Paoli in a $50,000 drug deal in Miami. Second, they

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[11] Delli Paoli criticizes only counsel's tactical decision to introduce into evidence an address book that had been seized from Delli Paoli at the time of his arrest.

[12] *Cross* v. *United States*, 392 F.2d 360 (8th Cir. 1968), upon which Delli Paoli relies (79-118 Pet. 55), is clearly distinguishable. In that case defense counsel had told the trial court that he had intentionally been derelict in his performance and had not "attempt[ed] to develop the case," citing specific examples of the things he should have done but failed to do. 392 F.2d at 365-367.

object to a witness' reference to a statement by Warme that Delli Paoli was "hooked up with 'Fat' Tony Salerno and the 'Pleasant Avenue people.'" Petitioners assert that this testimony introduced the "spectre of organized crime" at trial.

As the court of appeals correctly held (Pet. App. 12a), Warme's statement about Delli Paoli's involvement in a "$50,000 heroin deal" was admissible "to prove capability and intent, [and] also as a classic statement in furtherance of the conspiracy." See Fed. R. Evid. 404(b), 801(d)(2)(E); *United States* v. *Knuckles*, 581 F.2d 305, 313-314 (2d Cir.), cert. denied, 439 U.S. 986 (1978); *United States* v. *Carlson*, 547 F.2d 1346, 1354 & n.5 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977). The evidence was undoubtedly damaging, as evidence of a crime invariably is, but it was not unfair or improper and therefore not "prejudicial." Moreover, the court gave the jury cautionary instructions on the proper use of that evidence (Tr. 306-308, 312-313). The court of appeals also correctly held (Pet. App. 13a) that the "passing reference" to Delli Paoli's alleged connection with "'Fat' Tony Salerno and the Pleasant Avenue People" could not have linked petitioners to organized crime, and in any event the district court expressly instructed the jury to disregard that testimony (Tr. 306).

b. Warme contends (79-5121 Pet. 24-38, 62-67) that the district court erred in declining to charge the jury on entrapment and refusing to require the government to disclose whether a person

identified as "Lorraine," who had introduced the undercover officer to Warme but did not testify at trial, was a government informant. However, as the court of appeals observed (Pet. App. 15a-16a), these rulings were correct since Warme failed to make any showing that "Lorraine's" relationship with the government was relevant to his defense and "never introduced any evidence tending to support an entrapment defense."

c. Finally, the court of appeals correctly rejected (Pet. App. 9a-12a) Delli Paoli's claim (79-118 Pet. 48-54) that there was a variance between the proof at trial and the single conspiracy charged in the indictment. As the court concluded, the proof showed that Warme headed an ongoing narcotics business in which he arranged sales of large amounts of drugs through his co-defendants, and that "[e]ach of the defendants knew of Warme's general plan and of the role each played in the attempt to bring that plan to fruition" (Pet. App. 10a). Thus, the court held that "there was sufficient evidence to permit the jury to find the single conspiracy charged in the indictment" (*ibid.*). See *United States* v. *Moten*, 564 F.2d 620, 625 (2d Cir.), cert. denied, 434 U.S. 959 (1977); *United States* v. *Ricco*, 549 F.2d 264, 267-268 (2d Cir.), cert. denied, 431 U.S. 905 (1977).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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